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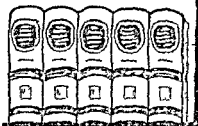
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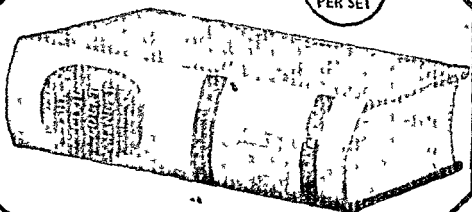
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*Kathi Kalu Oghad's case*¹, has not set out a different test for determining the stage when a person may be said to be accused of an offence. In *Kathi Kalu Oghad's case*¹, the Court merely set out the principles in the light of the effect of a formal accusation on a person, viz, that he stands in the character of an accused person at the time when he makes the statement. Normally a person stands in the character of an accused when a First Information Report is lodged against him in respect of an offence before an officer competent to investigate it, or when a complaint is made relating to the commission of an offence before a Magistrate competent to try or send to another Magistrate for trial the offence, where a Customs Officer arrests a person and informs that person of the grounds of his arrest, (which he is bound to do under Article 22 (1) of the Constitution) for the purposes of holding an enquiry into the infringement of the provisions of the Sea Customs Act which he has reason to believe has taken place, there is no formal accusation of an offence. In the case of an offence by infringement of the Sea Customs Act and punishable at the trial before a Magistrate there is an accusation when a complaint is lodged by an officer competent in that behalf before the Magistrate.

15. The decision of this Court in *Bhagwandas Goenka v The Union of India*², lays down no principle inconsistent with the view we have expressed. In *Bhagwandas Goenka's case*², the appellant was charged with using a sum of 4,000 dollars borrowed by him when he was on a visit to the United States of America and with depositing cheques of the value of 500 dollars with a foreign bank in which he had an account, and thereby infringing section 4 (1) and (3) read with section 23 of the Foreign Exchange Regulation Act VII of 1947. At the trial before a Magistrate the appellant contended that the information demanded and obtained from him on 19th September, 1952 and 14th May, 1953, by the Reserve Bank of India under section 19 of the Foreign Exchange Regulation Act with respect to the two sums was inadmissible. This Court negatived the

contention observing that no information was collected from the accused after 4th July, 1955, when he was asked to show cause by the Reserve Bank why he should not be prosecuted for contravention of the various provisions of the Act with respect to the two sums. The Court observed :

“The information collected under section 19 is for the purpose of seeing whether a prosecution should be launched or not. At that stage when information is being collected there is no accusation against the person from whom information is being collected. It may be that after the information has been collected the Central Government or the Reserve Bank may come to the conclusion that there is no case for prosecution and the person concerned may never be accused. It cannot therefore be predicated that the person from whom information is being collected under section 19 is necessarily in the position of an accused. The question whether he should be made an accused is generally decided after the information is collected and it is when a show cause notice is issued as was done in this case on 4th July, 1955, that it can be said that a formal accusation has been made against the person concerned. We are therefore of the opinion that the appellant is not entitled to the protection of Article 20 (3) with respect to the information that might have been collected from him under section 19 before 4th July, 1955.”

Under section 19 of the Foreign Exchange Regulation Act, 1947, it is open to the Central Government or the Reserve Bank of India, if it considers necessary or expedient, to obtain and examine any information, book or other document in the possession of any person or which in the opinion of the Central Government or the Reserve Bank it is possible for such person to obtain and furnish, by order in writing, to require any such person to furnish, or to obtain and furnish, to the Central Government or the Reserve Bank or any person specified in the order with such information, book or other document. The information which was asked for and obtained in *Bhagwandas Goenka's case*¹ under section 19 of the Foreign Exchange Regulation Act was not

1 (1962) 3 S.C.R. 10 : (1963) 1 S.C.J. 195 : (1965) M.L.J. (Cr.) 97.

2. CrI. As. Nos. 131 and 132 of 1961, dated 20th September, 1963.

1. CrI. As. Nos. 131 and 132 of 1961, dated 20th September, 1963.

held to be information obtained in violation of Article 20 (3) of the Constitution, for the accusation in the view of the Court was made against the appellant for the first time on 4th July, 1955 when the Reserve Bank of India called for an explanation of the appellant why he should not be prosecuted for contravention of the various provisions of the Foreign Exchange Regulation Act. Under the proviso to section 23 (3) of that Act it is enacted that "where any such offence is the contravention of any of the provisions of this Act or any rule, direction or order made thereunder which prohibits the doing of an act without permission no such complaint shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission. In the light of the proviso the Court assumed that when an authority which is statutorily authorised and bound to call for an explanation before a complaint is filed serves a formal notice calling for explanation, a formal accusation may be deemed to be made. But that is not the position in the present case.

16 In our judgment the view expressed by Sinha J in *Calcutta Motor and Cycle Company v. Collector of Customs*¹, that a proceeding under section 171-A of the Sea Customs Act 1878 being preliminary to a criminal trial any statement procured would be inadmissible under Article 20 (3) there being a formal accusation relating to the commission of an offence which in the normal course may result in prosecution, is not correct. Opinion of the Court recorded in appeal from that judgment in *Collector of Customs and others v. Calcutta Motor and Cycle Company*² in which Chakravarti, C.J., observed that the protection of Article 20 (3) avails even where a person is not formally accused or charged is inconsistent with the judgments of this Court already referred cannot also be accepted as correct.

17 The views expressed by the Madras High Court in *Collector of Customs Madras v. Kotumal Bhurumal Pihlajani*,³ at page 275 that

"the bar under Article 20 (3) of the constitution will not be available to the statements in the case since it is not in dispute that they have been recorded only during an investigation undertaken by the Customs Officer under sections 107 and 108 of the Customs Act of 1952 and at a time when the deponents did not stand in the position of accused in the light of the principles stated in the decisions cited above"

and by the Bombay High Court in *Laxman Padma Bhagat v. The State*⁴, that a person examined under section 171 A of the Sea Customs Act 1878 does not stand in the character of an accused person inasmuch as there is no formal accusation made against him by any person at that time are, in our judgment, substantially correct.

18 We therefore, agree with the High Court that the statements made by Mehta and the other persons accused before the Additional District Magistrate, 24 Parganas, were not inadmissible in evidence because of the protection granted under Article 20 (3) of the Constitution.

Criminal Appeal No 45 of 1968

19 On 6th March, 1963, six parcels containing watches were seized by the Customs authorities at Santa Cruz Airport, Bombay. The Customs authorities recorded statements of the appellant Chitnis and attached certain documents from him. Thereafter the Customs authorities filed a complaint against Chitnis and thirteen others for offences under section 120 B Indian Penal Code read with section 167 (81) of the Sea Customs Act and section 135 of the Customs Act 1962, read with section 109, Indian Penal Code alleging that between 15th August, 1952 and 28th January, 1963 and between 5th February, 1963 and 6th March 1963 the offenders had imported watches and had on that account committed offences under section 120 B Indian Penal Code read with section 167 (81) of the Sea Customs Act and section 120 Indian Penal Code read with section 135 of the Customs Act, 1962, read with section 109 Indian Penal Code respectively. At the trial the prosecutor tendered in evidence certain statements made before the Customs authorities by the accused. The Advo-

1 A.I.R. 1956 Cal 253

2 A.I.R. 1958 Cal 682.

3 (1967) 1 M.L.J. 403 (1967) M.L.J. (Cri.)

381 I.L.R. (1967) 1 Mad 665 A.I.R. 1967 Mad 263

cate for the accused objected to the admissibility of those statements. The trial Magistrate rejected the contention and in a revision application filed before the High Court of Bombay the order passed by the Presidency Magistrate was confirmed.

Criminal Appeal No. 46 of 1968.

20. Dady Adarji Fatakia was arrested on 26th December, 1964. At that time he was found in possession of 540 watches. He was served with a summons under section 108 of the Customs Act, 1962, and he made a statement before a Customs Officer. Thereafter a complaint was filed before the Presidency Magistrate, Bombay, against Fatakia for offences under section 135 (a) and (b) of the Customs Act, 1962. At the trial the public prosecutor supplied to the accused copies of the statements made by Fatakia. The accused Fatakia, then applied to the Magistrate that the statements if tendered in evidence would be inadmissible because they were inadmissible under section 25 of the Evidence Act or section 162 of the Code of Criminal Procedure or under Article 20 (3) of the Constitution. The contention were negatived by the Magistrate and in a revision application to the High Court the order of the Presidency Magistrate was confirmed.

Criminal Appeal No. 47 of 1968.

21. On 30th May, 1965, the Customs Officer seized 11,000 tolas of gold from a room in the occupation of the appellant Poonamchand and then recorded his statement after serving him with a summons under section 108 of the Customs Act, 1962. A complaint was filed against the appellant and two others in the Court of Additional Chief Presidency Magistrate, 8th Court, Bombay, under section 120-B, Indian Penal Code and section 135 of the Customs Act, and Rule 126-P (2) (II) and (IV) of the Defence of India Rules and rule 126-P (2) (II) and (IV) of the Defence of India Rules read with section 109, Indian Penal Code and section 135 of the Customs Act, 1962, read with section 109, Indian Penal Code. At the trial evidence was given by the Superintendent, Central Excise, Marine and Preventive Division, that the persons accused had made certain oral statements in his presence admitting their complicity in

smuggling gold. An application by Poonamchand raising the contention that the statements were inadmissible under section 25 of the Indian Evidence Act and Article 20 (3) of the Constitution was rejected on the ground that the application was premature. A revision application was then filed in the High Court and it was heard with the other petitions and was rejected.

22. In the three appeals Nos. 45, 46 and 47 of 1968 the statements were made to or recorded before the Customs Officers in an enquiry made under the Customs Act, 1962. It was urged on behalf of the appellants that the statements made before the Customs Officers exercising power under the Customs Act, 1962, are inadmissible at the trial of a person accused of an offence under the Customs Act, 1962, because of section 25 of the Evidence Act and Article 20 (3) of the Constitution.

23. The scheme of the Customs Act, 1962, relating to searches, seizure and arrest, and confiscation of goods and conveyances and imposition of penalties may be briefly examined. Under sections 100 and 101 a Customs Officer has power to search any person to whom these sections apply if the officer has reason to believe that such person has secreted about his person, any goods liable to confiscation or any documents relating thereto. Section 104 confers upon the Customs Officer power to arrest if he had reason to believe that any person in India or within the Indian Customs waters has been guilty of an offence punishable under section 135. Every person so arrested must be informed of the grounds for such arrest. Section 105 authorises any Assistant Collector of Customs to search any premises if he has reason to believe that goods liable to confiscation or any documents or things which in his opinion will be useful for or relevant to any proceeding under the Act, are secreted in any place, he may authorise any officer of customs to search or may himself search for such goods, documents or things. Under section 104 (3) where an officer of customs has arrested any person under sub-section (1) he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police station has and

is subject to under the Code of Criminal Procedure, 1898 By section 107 any officer of customs empowered in that behalf by general or special order of the Collector of Customs may, during the course of any enquiry in connection with the smuggling of any goods—(a) require any person to produce or deliver any document or thing relevant to the enquiry and (b) examine any person acquainted with the facts and circumstances of the case Section 108 confers upon a gazetted officer of customs the powers to summon any person whose attendance he considers necessary to give evidence or to produce a document or any other thing in any enquiry which such officer is making in connection with the smuggling of goods The person so summoned is bound to attend and to state the truth upon any subject respecting which he is examined or make statements and produce such documents and other things as may be required, and every such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code Section 110 authorises the proper officer to seize such goods as he has reason to believe are liable to confiscation under the Act Sections 111 to 127 deal with confiscation of goods and conveyances and with imposition of penalties An appeal lies to the appropriate authority at the instance of a person aggrieved by any decision or order passed under the Act within the time specified under section 128 Under section 130 the Central Board of Revenue may exercise revisional powers in respect of orders passed by the Subordinate Customs authorities and section 131 authorises the Central Government on the application of any person aggrieved by certain orders specified therein to exercise the power to annul or modify such orders Sections 132 to 139 deal with offences and prosecution Section 135 provides, insofar as it is material

“Without prejudice to any action that may be taken under this Act, if any person—

(a) is in relation to any goods in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time

being in force with respect to such goods, or

(b) acquires possession of or is in any way concerned in carrying removing, depositing, harbouring, keeping, concealing selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111, he shall be punishable,—

- (i) * * * * *
- (ii) * * * * *

Section 137, insofar as it is material provides

“(1) No Court shall take cognizance of any offence under section 132 section 133 section 134 or section 135 except with the previous sanction of the Collector of Customs

(2) No Court shall take cognizance of any offence under section 136 —

(a) where the offence is alleged to have been committed by an officer of customs not lower in rank than Assistant Collector of Customs except with the previous sanction of the Central Government,

(b) * * * * *

The Customs Act LII of 1962 invests the Customs Officer with the power to search a person and to arrest him to search premises, to stop and search conveyances, and to examine persons, and also with the power to summon persons to give evidence and to produce documents and seizure of goods documents and things which are liable to confiscation He is also invested with the power to release a person on bail He is entitled to order confiscation of smuggled goods and impose penalty on persons proved to be guilty of infringing the provisions of the Act It is implicit in the provisions of section 137 that the proceedings before a Magistrate can only be commenced by way of a complaint and not on a report made by a Custom Officer

24 In certain matters the Customs Act of 1962 differs from the Sea Customs Act of 1878 For instance, under the Sea Customs Act search of any place could not be made by a Custom Officer of his own accord he had to apply for and obtained a search warrant from a Magistrate

Under section 105 of the Customs Act, 1962, it is open to the Assistant Collector of Customs himself to issue a search warrant. A proper officer is also entitled under that Act to stop and search conveyances : he is entitled to release a person on bail, and for that purpose has the same powers and is subject to the same provisions as the officer-in-charge of a police station is. But these additional powers with which the Customs Officer is invested under the Act of 1962 do not, in our judgment, make him a police officer within the meaning of section 25 of the Evidence Act. He is, it is true, invested with the powers of an officer-in-charge of a police station for the purpose of releasing any person on bail or otherwise. The expression "or otherwise" does not confer upon him the power to lodge a report before a Magistrate under section 173 of the Code of Criminal Procedure. Power to grant bail, power to collect evidence and power to search premises or conveyances without recourse to a Magistrate, do not make him an officer-in-charge of a police station. Proceedings taken by him are for the purpose holding an enquiry into suspected cases of smuggling. His orders are appealable and are subject also to the revisional jurisdiction of the Central Board of Revenue and may be carried to the Central Government. Powers are conferred upon him primarily for collection of duty and prevention of smuggling. He is for all purposes an officer of the revenue.

25. For reasons set out in the judgment in Criminal Appeal No. 27 of 1967 and the judgment of this Court in *Badku Joti Savant's case*¹, we are of the view that a Customs Officer is under the Act of 1962 not a police officer within the meaning of section 25 of the Evidence Act and the statements made before him by a person who is arrested or against whom an inquiry is made are not covered by section 25 of the Indian Evidence Act.

26. It was strenuously urged that under section 104 of the Customs Act, 1962, the Customs Officer may arrest a person only if he has reason to believe that any person in India or within the Indian Customs waters has been guilty of an offence

punishable under section 135 and not otherwise and he is bound to inform such person of the grounds of his arrest. Arrest of the person who is guilty of the offence punishable under section 135 and information to be given to him amount, it was contended, to a formal accusation of an offence and in any case the person who has been arrested and who has been informed of the nature of the infraction committed by him stands in the character of an accused person. We are unable to agree with that contention. Section 104 (1) only prescribes the conditions in which the power of arrest may be exercised. The officer must have reason to believe that a person has been guilty of an offence punishable under section 135, otherwise he cannot arrest such person. But by informing such person of the grounds of his arrest the Customs Officer does not formally accuse him with the commission of an offence. Arrest and detention are only for the purpose of holding effectively an inquiry under sections 107 and 108 of the Act with a view to adjudging confiscation of dutiable or prohibited goods and imposing penalties.² At that stage there is no question of the offender against the Customs Act being charged before a Magistrate. Ordinarily after adjudging penalty and confiscation of goods for without doing so, if the Customs Officer forms an opinion that the offender should be prosecuted he may prefer a complaint in the manner provided under section 137 with the sanction of the Collector of Customs and until a complaint is so filed the person against whom an inquiry is commenced under the Customs Act does not stand in the character of a person accused of an offence under section 135.

27. Section 167 of the Sea Customs Act, 1878, contained a large number of clauses which described different kinds of infractions and different penalties or punishments liable to be imposed in respect of those infractions. Under the Customs Act, 1962, the Customs Officer is authorised to confiscate goods improperly imported into India and to impose penalties in cases contemplated by sections 112 and 113. But on that account the basic scheme of the Sea Customs Act, 1878, is not altered. The Customs Officer even under the Act of 1962 continues to remain a revenue officer primarily concerned with the detection of smuggling and

1. (1967) M.L.J. (Cr.) 36 : (1967) 1 S.C.J. 701 : (1966) 3 S.C.R. 698.

enforcement and levy of proper duties and prevention of entry into India of dutiable goods without payment of duty and of goods of which the entry is prohibited. He does not on that account become either a police officer nor does the information conveyed by him when the person guilty of an infraction of the law is arrested, amount to making of an accusation of an offence against the person so guilty of infraction. Even under the Act of 1962 a formal accusation can only be deemed to be made when a complaint is made before a Magistrate competent to try the person guilty of the infraction under sections 132, 133, 134 and 135 of the Act. Any statement made under sections 107 and 108 of the Customs Act by a person against whom an enquiry is made by a Customs Officer is not a statement made by a person accused of an offence.

28 Before parting with the case, we must observe that this Court has been invited in this group of appeals to consider the question of admissibility of evidence before the trial was completed. At various stages of argument counsel asked us to make several assumptions on matters of evidence which were not before this Court. In some cases the statements made by the accused before the Customs Officer were tendered in evidence and were objected to, in other cases even before the statements were tendered in evidence, objections were raised. We may also observe that we are not concerned in these appeals to decide whether the statements relied upon were obtained from persons charged with infraction of the provisions of the Customs Act by officers having authority over them by inducement, threat or promise having reference to the inquiry made against them. These questions if raised have to be decided at the trial of the appellants. The appeals fail and are dismissed.

VMK.

Appeals dismissed

THE SUPREME COURT OF INDIA

(Original Jurisdiction)

PRESENT — *M Hidayatullah, C.J., J C Shah V Ramaswami, K S Hegde and A N Grover, JJ*

M/s. Rattan Lal & Co and another etc
*Petitioners**

v

The Assessing Authority, Patiala and another etc
Respondents

Pradip Kumar and another
Interveners

Punjab General Sales Tax Act (XLVI of 1948) as amended by the Punjab General Sales Tax (Amendment and Validation) Act (VII of 1967) section 5 (3) (i) and (ii) and Central Sales Tax Act (LXIV of 1956) section 15—Interpretation—Stage of sales tax—The provisions specifying the stage as the last purchase or sale by a dealer liable to pay the tax—Provisions, if in conflict with section 15 of the Central Act

On the question whether section 5 (3) (i) and (ii) of the Punjab General Sales Tax Act 1948 as amended by the Punjab General Sales Tax (Amendment and Validation) Act 1967, was in conflict with the provisions of section 15 of the Central Sales Tax Act, 1956,

Held that, the stage of tax stated in section 5 (3) (i) and (ii) is as follows. In the case of sales tax, the stage of tax is the sale of such goods by the last dealer liable to pay the tax and in the case of purchase tax the stage is purchase by the last dealer liable to pay tax. It is also provided that the turnover of any dealer for any period shall not include his turnover during that period of any sale or purchase of declared goods at any other stage than the stage so mentioned. [Para 6]

It will be seen that the matter is now in the hands of the dealer. He has to find out for himself whether he is liable to pay tax or not. A dealer knows what he has done with his goods or is going to do with them. If he knows that he is not the last dealer having parted with the goods to another

* WP Nos 133, 165, 169 to 172, 185, 218, 219, 227, 228, 230, 239, 252, 253, 248 and 249 of 1968

dealer or he knows that he is going to use the goods or sell them to the customers, he knows when he is not liable to tax and when he is. Therefore, he will not include the transaction in his taxable turnover in the first case but include it in the second. Goods in the hands of a dealer are not taxed. They are only taxed on the last purchase or sale. This information is always possessed by a dealer and by providing that he need not include in his turnover any transaction except when he is the last dealer, the position is now clear.

[Para. 7.].

If the dealer is clear about his own position he is now quite able to see whether he is the last purchaser liable to pay the tax or the last seller liable to pay the tax. The Act by specifying the stage as the last purchase or sale by a dealer liable to pay the tax makes the stage quite clear and by giving an option to him not to include such transactions in his return saves him from the liability to pay the tax till he is the dealer liable to pay the tax. The provisions of section 5 (3) (i) and (ii) of the Act are quite sufficient to make them accord with the provisions of section 15 of the Central Act.

[Para. 8.].

Under Article 32 of the Constitution of India for Enforcement of the Fundamental Rights

S. V. Gupte, Senior Advocate, (*S. K. Mehta* and *K. L. Mehta*, Advocates of *M/s. K. L. Mehta & Co.*, with him), for Petitioners (In W.P. No. 133 of 1968).

C. D. Garg, Advocate, and *S. K. Mehta* and *K. L. Mehta*, Advocates of *M/s. K. L. Mehta & Co.*, for Petitioners (In W.P. No. 165 of 1968).

Hardev Singh, Advocate, for Petitioners (In W.Ps. Nos. 169 and 170 of 1968).

V. C. Mahajan, Advocate and *S. K. Mehta* and *K. L. Mehta*, Advocates of *M/s. K. L. Mehta & Co.*, for Petitioners (In W.Ps. Nos. 171, 172, 218, 219, 227, 228, 230, 239, 248, 249, 252 and 253 of 1968).

M. C. Chagla, Senior Advocate, (*A. N. Sinha* and *B. P. Jha*, Advocates, with him), for Petitioners (In W.P. No. 185 of 1968).

Niren De, Solicitor-General of India (*O. P. Malhotra* and *R. N. Sachthey*, Advocates, with him), for Respondents (In W. Ps. Nos. 133 and 165 of 1968).

Anand Saroop, Advocate-General, for State of Haryana, (*R. N. Sachthey*, Advocate, with him), for Respondents (In W. Ps. Nos. 218, 219, 227 and 228 of 1968).

O. P. Malhotra and *R. N. Sachthey*, Advocates, for Respondent (In W. Ps. Nos. 169 to 172 of 1968).

R. N. Sachthey, Advocate, for Respondents (In W. Ps. Nos. 185, 230, 239, 248, 249, 252 and 253 of 1968).

B. Datta, Advocate, and *P. C. Bhartari*, Advocate for *M/s. J. B. Dadachanji & Co.*, for Interveners (In W. P. No. 165 of 1968).

The Judgment of the Court was delivered by

Hidayatullah, C. J.—These are 17 petitions challenging the validity of the Punjab General Sales Tax (Amendment and Validation) Act, 1967 (VII of 1967) by the Punjab Legislature and the Punjab Sales Tax (Haryana Amendment and Validation) Act, 1967. Thirteen of these petitions challenge the Punjab Amendment Act and four challenge the Haryana Amendment Act.

2. The petitioners are firms or companies dealing in cotton or oil seeds. Their business is to purchase ginned and unginned cotton for manufacturing yarn and selling the said cotton also to registered and unregistered dealers both inside and outside the State. The petitioners of the second category purchase oil seeds for use in manufacture of edible oils. The surplus oil-seeds are sold to other dealers, registered or unregistered, inside and outside the State of Punjab. Both these commodities are essential commodities to which the Central Sales Tax Act applies. Certain provisions of these Amending Acts are challenged on the ground that they offend section 15 of the Central Act and are also unconstitutional being in violation of Articles 14 and 19.

3. The Punjab General Sales Tax Act was passed in 1948. It was amended from time to time. The Act as it stood on 1st April, 1960, was challenged in *Bhawanji Cotton Mills Ltd. v. State of Punjab and another*¹. On 10th April, 1967, this Court

1. (1968) 1 S C J. 545 : (1967) 3 S.C.R. 577.

by majority struck down certain portions of the Act on the ground that they were in conflict with the provisions of section 15 of the Central Act. On 1st November, 1966, the former State of Punjab bifurcated and the States of Punjab and Haryana came into existence. On 29th December, 1967, the Punjab Legislature enacted Act VII of 1967 amending the original Act and the following day the President's Act instituted the Punjab General Sales Tax (Haryana Amendment and Validation) Act 1967 (XIV of 1967) was passed for Haryana. Both the Acts were preceded by Ordinances which they replaced. It is not necessary to refer to the Ordinances.

4 Section 15 of the Central Sales Tax Act, 1956 (LIV of 1956) provided as follows

' 15 *Restrictions and conditions in regard to tax on sale or purchase of declared goods within a State*

Every sales tax law of a State shall, in so far as it imposes or authorises the imposition of a tax on the sale or purchase of declared goods be subject to the following restrictions and conditions, namely —

(a) the tax payable under that law in respect of any sale or purchase of such goods inside the State shall not exceed three per cent of the sale or purchase price thereof, and such tax shall not be levied at more than one stage,

(b) where a tax has been levied under that law in respect of the sale or purchase inside the State of any declared goods and such goods are sold in the course of inter State trade or commerce the tax so levied shall be refunded to such person in such manner and subject to such conditions as may be provided in any law in force in that State

The section provides that in respect of declared goods the tax (sales or purchase) shall not exceed the prescribed limit and shall not be levied at more than one stage and shall be refunded to persons from whom it is collected if the goods are sold in the course of inter-State trade or commerce. The original Punjab General Sales Tax Act 1948, was challenged before this Court in

*Bhawani Cotton Mills Ltd case*¹ The Act in defining the taxable turnover in section 5 (2) allowed certain deductions and one such deduction in clause (vi) was ;

turnover during that period on the purchase of goods which are sold not later than six months after the close of the year to a registered dealer, or in the course of inter State trade or commerce, or in the course of export out of the territory of India

Provided that in the case of such a sale to a registered dealer, a declaration, in the prescribed form and duly filled and signed by the registered dealer to whom the goods are sold, is furnished by the dealer claiming deduction

The original section, as it stood on 1st April, 1960 read as follows

" 5 *Rate of tax*

(1) Subject to the provisions of this Act there shall be levied on the taxable turnover every year of a dealer a tax at such rates not exceeding four naye Paise in a rupee as the State Government may by notification direct

Provided

Provided further that the rate of tax shall not exceed two naye paise in a rupee in respect of any declared goods as defined in clause (c) of section 2 of the Central Sales Tax Act, 1956 and such tax shall not be levied on the purchase or sale of such goods at more than one stage

Provided

(2) In this Act the expression " taxable turnover " means that part of a dealer's gross turnover during any period which remains after deducting therefrom—

(a) his turnover during that period on—

(i)
(ii) sales to a registered dealer of goods declared by him in a prescribed form

* * * *

(vi) the purchase of goods which are sold not later than six months after the close of the year, to a registered dealer or in the course of inter-State trade or commerce, or in the course of export out of the territory of India :

Provided that in the case of such a sale to a registered dealer, a declaration, in the prescribed form and duly filled and signed by the registered dealer to whom the goods are sold, is furnished by the dealer claiming deduction.

* * * * *

It was contended in that case that sections 2 (ff), 5 (1) second proviso and 5 (2) (a) (vi) were in conflict with section 15 of the Central Act. Bhawani Mills were dealers registered under the Punjab General Sales Tax Act, 1948, and for the assessment years 1960-61, 1961-62 and 1962-63 the Mills denied their liability to the Central Sales Tax on the purchase of cotton in the accounting years.

5. The scheme of the Act then in force put the tax on purchase of cotton (which was a declared commodity) at the rate of 2 naye paise in a rupee. By the second proviso to section 5 (1) it was further provided that such tax shall not be levied on the purchase or sale of such goods at more than one stage. The word 'dealer' at that time was defined as follows :

"Dealer means any person including a Department of Government who in the normal course of trade sells or purchases any goods that are actually delivered for the purpose of consumption in the State of Punjab, irrespective of the fact that the main place of business of such person is outside the said State and where the main place of business, of any such person is not in the said State, 'dealer' includes the local manager or agent of such person in Punjab in respect of such business."

The provisions for taxing purchases of cotton were challenged on the ground that there was a possibility of the tax being levied at more than one stage, the provisions of the second proviso notwithstanding. The argument was summarized by our brother Vaidialingam thus :

"In this case, according to the appellant, it has to send quarterly returns, even during the accounting year and, as per section 10 (4) of the Act, it has to pay also tax, in accordance with the returns submitted by it for every quarter. In the returns that are being sent, the dealer will have to include all purchases of cotton, effected by him during the quarter for which the return is sent. There is no indication, either in the Act or in the rules or the forms prescribed, as to whether the persons from whom the appellant purchased cotton, have paid tax or not. Section 15 of the Central Act is not restricted only to registered dealers. There will also be nothing to guide the appellant to know as to whether the goods, purchased by it, have been sold to it by its vendor within the period mentioned in clause (vi) of section 5 (2) (a) of the Act. Under those circumstances, there is always a possibility, or even a certainty, of more persons than one having paid tax or being made liable to pay tax in respect of the same goods at different stages. That is quite opposed to the provisions of section 15 (a) of the Central Act. Even otherwise, it is pointed out that if a person has purchased cotton and sells it after the period provided for in section 5 (2) (a) (vi), that party is liable to pay sales tax and would have also paid the same. Another purchaser from the said party will also be liable to pay tax, on the same commodity if he sells the goods, after the period mentioned in clause (iv).

That is, two persons are made liable for payment of tax, in respect of the same commodity. In other words the purchases of the same item of declared goods, by the persons indicated above, are made liable for tax, whereas under the Central Act, there can be only one levy and collection of tax at one stage, either on sale or on purchase."

Learned Counsel in that case showed by way of contrast how the Madras, Mysore, Andhra Pradesh and U. P., had avoided such a consequence. In answer, it was pointed out by the State that since the

tax was levied, whether on sale or purchase at the very first transaction, the stage was fixed and that the dealer could always claim exemption under section 5 (2) (a) (vi) or a refund under section 12 of the Act. This Court in its majority judgment did not consider that the second proviso to section 5 (1) by its mere declaration prevented the levy of tax at more than one stage. The difficulty however remained that the Act itself did not indicate the stage at which the tax was to be levied and because under section 15 (1) of the Central Act there could be no liability for payment of tax unless this stage was so stated in the Act or the rules thereunder. It was pointed out that a dealer would have to show in his return all purchases of cotton and pay the tax with his return. There was nothing which would have enabled the dealer to show whether the tax had already been paid by another dealer and to exclude from his return those transactions. The dealer could not take a chance as heavy penalties were provided. This was particularly so where the goods passed through an unregistered dealer's hands at an intermediate stage. In dealing with the latter part of the reasons this Court gave an example which may be quoted here

" if a dealer 'A' sells the declared goods to 'B' six months after the close of the year (B being a registered dealer) A becomes liable to purchase tax. But if B sells the identical declared goods again after the period mentioned in sub clause (vi), he will also be liable to pay purchase tax. That means, in respect of the same item of declared goods more than one person is made liable to pay tax and the tax is also levied at more than one stage. That is not permissible under section 15 (a) of the Central Act. If goods are resold to a non-registered dealer, within the period sub-clause (vi) will not help the original purchaser. We may also point out at this stage that sub-clause (vi) of section 5 (2) (a) negatives the assumption that the normal rule under the Act, in respect of declared goods is to levy the tax on the first purchaser."

This Court then referred to section 12 where there is a provision for refund which taken with rules 48-58 allowed for refund to be claimed and found the provisions insufficient to get over the difficulty. This Court observed

" Even in the matter of obtaining refunds, there can be no controversy that the appellant will have to place, before the officer concerned, particulars of transactions connected with the commodity in question and also the basis on which it claims the relief. It will be absolutely difficult, if not impossible for persons like the appellant to collect materials in this behalf, because, there is no provision contained either in the Act or the Rules, on the basis of which it will be entitled to be supplied with all the material information relevant for sustaining a request for refund. If the Central Act makes it mandatory that the tax can be collected only at one stage in our opinion it is not enough for the State to say that a person who is not liable to pay tax must nevertheless pay it in the first instance and then claim refund at a later stage. We may state that the question as to how far a party can ask for refund, without the order of assessment being set aside by appropriate proceedings is highly doubtful, because at the time when the actual order of assessment is passed, in certain cases, it may not be possible for a party to say whether he is entitled to exemption or not under sub-clause (vi) of section 5 (2) of the Act. If a person is not liable for payment of tax at all at any time the collection of a tax from him with a possible contingency of refund at a later stage, will not make the original levy valid because if particular sales or purchases are exempt from taxation altogether, they can never be taken into account, at any stage for the purpose of calculating or arriving at the taxable turnover and for levying tax."

Relying upon the observations in *A V Fernandez v State of Kerala*¹, this Court concluded

¹ (1957) SCR 837 (1957) SCJ 689 (1957) 2 An WR (SC) 129 (1957) 2 MLJ (SC) 129

"...the provisions contained in a statute with respect to exemptions of tax or refund or rebate, on the one hand, must be distinguished from the total non-liability or non-imposition of tax, on the other. These observations, also, in our opinion, effectively provide an answer to the stand taken by the State, in this case that section 12 of the Act provides an adequate relief by way of refund, even if tax is collected at an earlier stage."

The Amending Acts which are now challenged set about removing these difficulties. These amendments are again challenged on the same lines. It is convenient to take the two Amending Acts separately. First we shall take up for consideration the Punjab amendments. Here, we are concerned only with a few of the amendments made by the Amending Act VII of 1967. Section 5 was amended retrospectively from different dates. In sub-section (1), in the second proviso, the words "as defined in clause (c) of section 2 of the Central Sales Tax Act, 1956, and such tax shall not be levied on the purchase or sale of such goods at more than one stage" are now omitted. After the second proviso another proviso is introduced: In sub-section 1-A, the words "in respect of such goods other than declared goods" are substituted retrospectively from 16th December, 1965 for the words "in respect of such goods." After sub-section (2) a new sub-section (3) is introduced from 1st October, 1958. We may now set out the 5th sub-section as it emerges from the amendment before we deal with the objections:

"Section 5—Rate of tax.—(1) Subject to the provisions of this Act, there shall be levied on the taxable turnover of a dealer a tax at such rates not exceeding six naye paise in a rupee as the State Government may by notification direct."

(2) In this Act the expression 'taxable turnover' means that part of a dealer's gross turnover during any period which remains after deducting therefrom—

(a) his turnover during that period on—

(i)	*	*	*	*
	*	*	*	*

(vi) the purchase of goods which are sold not later than six months after the close of the year, to a registered dealer, or in the course of inter-State trade or commerce, or in the course of export out of the territory of India:

Provided that in the case of such a sale to a registered dealer, a declaration, in the prescribed form and duly filled and signed by the registered dealer to whom the goods are sold, is furnished by the dealer claiming deduction

(3) Notwithstanding anything contained in this Act,—

(a) in respect of declared goods, tax shall be levied at one stage and that stage shall be—

(i) in the case of goods liable to sales tax, the stage of sale of such goods by the last dealer liable to pay tax under this Act;

(ii) in the case of goods liable to purchase tax, the stage of purchase of such goods by the last dealer liable to pay tax under this Act;

(b) the taxable turnover of any dealer for any period shall not include his turnover during that period on any sale or purchase of declared goods at any stage other than the stage referred to in sub-clause (i), or as the case may be, sub-clause (ii) of clause (a)."

In addition, a new section, section 11-AA was added to the following effect:

"11-AA. Review of certain assessments, etc., of tax on declared goods:

(1) Notwithstanding anything contained in this Act, the Assessing Authority shall (whether or not an application is made to him in this behalf), review, all assessments and re-assessments made before the commencement of the Punjab General Sales Tax Amendment and Validation Act, 1967, in respect of declared goods and make such order varying or revising the order previously made as may be necessary for bringing the order previously made into conformity with the provisions of this Act as amended by the Punjab General Sales Tax (Amendment and Validation) Act, 1967:

Provided that no proceeding for review shall be initiated without giving the dealer concerned a notice in writing of not less than thirty days

' (2) Any dealer on whom a notice is served under sub-section (1) may within thirty days from the date of receipt of such notice intimate in writing the assessing authority of his intention to abide by the assessment or reassessment sought to be reviewed and if he does so the assessing authority shall not review such assessment or reassessment under this section

(3) No order shall be made under this section against any dealer without giving such dealer a reasonable opportunity of being heard

(4) Notwithstanding anything contained in any judgment decree or order of any Court or other authority to the contrary but subject to the provisions of the foregoing sub sections any assessment, re assessment, levy or collection of any tax in respect of declared goods made or purporting to have been made and any action or thing taken or done or purporting to have done in relation to such assessment, re assessment levy or collection under the provisions of this Act before the commencement of the Punjab General Sales Tax (Amendment and Validation) Act, 1967, shall be as valid and effective as if such assessment, re assessment levy or collection or action or thing had been made taken or done under this Act as amended by the Punjab General Sales Tax (Amendment and Validation) Act, 1967'

The argument is that the position has not altered at all even after the amendments and the liability to taxation at different stages remains still and the Act continues to be in conflict with the Central Act on the same reasons on which *Bhawani Mills Case*¹, proceeded. It is argued that the amendments have been made retrospective but no machinery is provided to enable the dealer to discover that the goods had been taxed before and the single stage at which the tax is to be levied is still not clearly discernible. This is the main argument but there are many supplementary argu-

ments which we shall notice later. For the present we confine our attention to the main point

6 The stage of tax now stated in section 5 (3) (i) and (ii). In the case of sales tax the stage of tax is the sale of such goods by the last dealer liable to pay the tax and in the case of purchase tax the stage is purchase by the last dealer liable to pay tax. It is also provided that the turnover of any dealer for any period shall not include his turnover during that period of any sale or purchase of declared goods at any other stage than the stage so mentioned

7 It will be seen that the matter is now in the hands of the dealer. He has to find out for himself whether he is liable to pay the tax or not. A dealer knows what he has done with his goods or is going to do with them. If he knows that he is not the last dealer having parted with the goods to another dealer or he knows that he is going to use the goods or sell them to consumers he knows when he is not liable to tax and when he is. Therefore he will not include the transaction in his taxable turnover in the first case but include it in the second. Goods in the hands of a dealer are not taxed. They are only taxed on the last purchase or sale. This information is always possessed by a dealer and by providing that he need not include in his turnover any transaction except when he is the last dealer, the position is now clear

8 It is contended that even so the dealer may not know that he is the last dealer and may make some mistake. The law does not take into account the actions of persons who are negligent or mistaken but only of persons who act correctly according to law. If the dealer is clear about his own position he is now quite able to see whether he is the last purchaser liable to pay the tax or the last seller liable to pay the tax. The Act by specifying the stage as the last purchase or sale by a dealer liable to pay the tax makes the stage quite clear and by giving an option to him not to include such transactions in his return saves him from the liability to pay the tax till he is the dealer liable to pay the tax. In our opinion, there-

1 (1968) 1 S.C.J. 345

fore, the present provisions of the Act are quite clear and are quite sufficient to make the amended Act accord with the Central Act. The arguments noted in the earlier case of this Court do not therefore arise.

9. It will thus be seen that the present Act does not suffer from any of the defects from which the unamended Act had suffered. It is, however, contended that the Act has been made retrospective but no machinery is provided to discover if the declared goods were assessed to tax more than once. As we have already pointed out, the matter is within the ken of the dealer himself and it is for him to decide whether he would not claim the benefit of section 11-AA and ask for a refund or in future transactions delete the sales from his taxable turnover when he is not the last dealer liable to pay the tax. Therefore the retrospectivity of the Act does not make any difference. It is not contended before us that it was not within the competence of the Punjab Legislature to pass such an Act retrospectively. The defect pointed out is the selfsame defect which was noticed in *Bhawani Mills case*.¹ But that defect no longer exists.

10. It is argued further that there is a discrimination between the two kinds of manufacturers. In the definition of 'dealer' in section (2) (d) and in the proviso to section 11-AA it is submitted arises because of the opportunity given to a dealer to ask for reassessment to the old assessment. This is open to every dealer and the intention is to give an opportunity to the dealer himself leaving it to his own will whether to ask for a refund or not. This hardly can be said to create a discrimination.

11. Lastly it is contended that there is a delegated legislation in that the minimum has been provided without indication of the circumstances under which the tax is to be levied. This, it is said, creates unguided delegation to administrative authority, the function of the Legislature. It is to be noticed that the Central Act itself gives power to the Legislature to choose a rate of tax at not more than 3 per cent of the taxable turnover. The tax levied is well within that Limit and therefore the Legislature has

chosen the maximum and has left it free to the authorities to impose the tax within that maximum regard being had to the requirements of revenue and the expenditure necessary for the State.

12. We may now deal with some arguments which are common to both sets of cases before considering the case of the Haryana amendment. It is argued that the reorganization of the State took place on 1st November, 1966 and the amendment in some of its parts seeks to amend the original Act from a date anterior to this date. In other words, the Legislature of one of the States seeks to amend a law passed by the composite state. This argument entirely misunderstands the position of the original Act after the reorganisation. That Act applied now as an independent Act to each of the areas and is subject to the legislative competence of the Legislature in that area. The Act has been amended in the new States in relation to the area of that State and it is unconceivable that this could not be within the competence. If the argument were accepted then the Act would remain unamendable unless the composite state came into existence once more. The scheme of the States Reorganisation Acts makes the laws applicable to the new areas until superseded, amended or altered by the appropriate Legislature in the new States. This is what the Legislature has done and there is nothing that can be said against such amendment.

13. In regard to Haryana cases also the same arguments are urged. It is contended that the amended Act there also offends section 15 for the reasons which we have given. Neither the amendment of section 5 in this area nor the introduction of section 11-AA for refund offends against section 15 of the Central Act or the equality clause of the Constitution. It is said that pending cases will always be reconsidered whether or not an application in that behalf is made in the case of disposal of cases it depends upon the party to intimate in writing that he has no objection to the assessment or reassessment already made. If any objection can be taken it will be by those whose cases are pending and not by those whose cases have been closed. The option to submit to the assessment is open to every one alike and there is no discrimination

if a party wants that his case need not be reconsidered. He has only to state that in writing and that would be the end of the matter. If he wants his case to be reconsidered then he can go before the Tribunal and get his case reconsidered.

14 It is also urged in this connection that there is a discrimination between the imported goods and local goods. It is said that the discrimination is also between the first purchase in the case of imported goods and last sale in the case of local goods. Since the imported goods might be more expensive by reason of freight etc. or intermediary sales having taken place it is said that the burden of tax will be heavier and therefore this will offend against the equality clause and Article 304 of the Constitution. In our opinion this argument is without any substance. The rate of tax is same in every case. In *State of Madras v N K Nataraja Mudaliar*¹, this Court stated that the essence of Articles 301 and 303 is to enable the State by a law "to impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in the State are subject, so however as not to discriminate between goods so imported and goods so manufactured or produced". It was pointed out by this Court that "imposition of differential rates of tax by the same State on goods manufactured or produced in the State and similar goods imported in the State is prohibited by that clause. But where the taxing State is not imposing rates of tax on imported goods different from rates of tax on goods manufactured or produced, Article 304 has no application".

15 Here also the tax is at the same rate and therefore the tax cannot be said to be higher in the case of imported goods. It may be that when the rate is applied the resulting tax is somewhat higher but that does not offend against the equality contemplated by Article 304. That is the consequence of *ad valorem* tax being levied at a particular rate. So long as the rate is the same Article 304 is satisfied. Even in the case of local manufacturers if their cost of production varies the net tax

collected will be more or less in some cases but that does not create any inequality because inequality is not the result of the tax but results from the cost of production of the goods or the cost of their importation. This ground, therefore, has also no substance. We do not think it necessary to set down here the provisions of the Haryana Amendment Act because they follow the scheme of the Punjab Amendment Act in substance and what we have said in regard to the Punjab Amending Act applies *mutatis mutandis* to Haryana Amendment Act also.

In the result these petitions have no substance. They are dismissed with costs. One set of hearing fee.

V M K

Petitions dismissed

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT—J C Shah and A N Grover, JJ

The Guntur Municipal Council

*Appellant**

v

The Guntur Town Ratepayer's Association, etc

Respondents

Madras District Municipalities Act (V of 1920), section 82 (2)—Annual value of Buildings under—Determination of—Municipality if has to look to and is bound by fair rent payable under the Rent Control Act

Section 82 (2) of the Madras District Municipalities Act makes provisions for the fixation of annual value according to the rent at which lands and buildings may reasonably be expected to be let from month to month or from year to year less the specified deduction. The test essentially is what rent the premises can lawfully fetch if let out to a hypothetical tenant. The municipality is thus not free to assess any arbitrary annual value and has to look to and is bound by the fair or the standard rent which would be payable for a particular premises under the Rent Control Act in force. In this respect no distinction can be made

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* C As Nos 1650 to 1652 of 1966

18th September 1970

between buildings the fair rent of which has been actually fixed under the Rent Control Act and those in respect of which no such rent has been fixed.

[*Paras 4 and 5.*]

Appeals by Special Leave from the Judgment and Decree dated the 3rd December, 1965 of the Andhra Pradesh High Court in Second Appeals Nos. 367, 368 and 369 of 1962.

B. V. Subrahmanyam, Senior Advocate (*A. V. Ranganam*, Advocate, with him), for Appellant (In all the Appeals).

M. Natesan, Senior Advocate (*K. Jayaram* Advocate, with him), for Respondents (In all the Appeals).

The Judgment of the Court was delivered by

Grover, J.—These appeals have been brought by Special Leave from a judgment of the Andhra Pradesh High Court.

2. Three suits, namely, O.S. Nos 222, 223 and 466 of 1960, were filed in the Guntur Court in which the relief claimed was for a declaration that the general revision of the rental values of the houses and buildings effected by the Guntur Municipality in the year 1960, for the purpose of assessment of tax was *ultra vires* and illegal and for a consequential relief of a permanent injunction restraining the municipality from acting on the special notices issued to the taxpayers.

3. Section 81 of the Madras District Municipalities Act, 1920, hereinafter called the "Municipalities Act" gives the description and classes of property tax and other taxes leviable by the municipality. Section 82 gives the method of assessment. It is provided by sub-section (2) of that section that the annual value of lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year less certain deductions. The District Munsif by a common judgment delivered in the three suits held that the annual value had to be computed in the context of the rent that was payable under the Rent Control legislation. The suits were decreed and a declaration was granted that the general revision made by the

Guntur Municipality in 1960 by increasing the rental value of houses to more than the rental value which prevailed on the dates provided in the Rent Control Acts in force prior to 1960 was *ultra vires* and illegal and permanent injunctions were granted restraining the municipality from acting upon the special demand notices issued to the rate-payers and from collecting the enhanced tax. Appeals were filed and the first appellate Court substantially upheld the judgment of the trial Court though certain modifications were made in the decrees passed by that Court. Appeals were taken to the High Court but the same were dismissed.

4. The only point which we are called upon to decide is whether before the fixation of a fair rent of any premises the municipality was bound to make assessment in the light of the provisions contained in the Rent Acts. A subsidiary question has also arisen whether the Courts below were justified in referring to and passing the decree keeping in view the Rent Acts which were in force prior to the enactment of the Andhra Pradesh Buildings (Lease Rent and Eviction) Control Act, 1960, hereinafter called the "Act". Now section 82 (2) of the Municipalities Act, as stated before, makes provision for the fixation of annual value according to the rent at which lands and buildings may reasonably be expected to be let from month to month or from year to year less the specified deduction. The test essentially is what rent the premises can lawfully fetch if let out to a hypothetical tenant. The municipality is thus not free to assess any arbitrary annual value and has to look to and is bound by the fair or the standard rent which would be payable for a particular premises under the Rent Act in force during the year of assessment. In *The Corporation of Calcutta v. Sm. Padma Debi and others*¹, it was held that on a fair reading of the express provisions of section 127 (a) of the Calcutta Municipal Act, 1923, the annual rent could not be fixed higher than the standard rent under the Rent Control Act. There the Rent Control Act of 1950, came into force before the assessment was finally determined and it

1. (1962) 3 S.C.R. 49.

was observed that the Corporation had no power to fix the annual valuation of the premises higher than the standard rent under that Act. The learned Counsel for the appellant has not made any attempt nor indeed he could do so to contest the above view. What has been stressed by him is that section 7 of the Act makes it clear that it is only after the fixation of the fair rent of a building that the landlord is debarred from claiming or receiving the payment of any amount in excess of such fair rent. It is urged that so long as the fair rent of a building or premises is not fixed the assessment of valuation by a municipality need not be limited or governed by the measure provided by the provisions of the Act for determination of fair rent. Logically such buildings or premises as are not let out to a tenant and are in the self occupation of the landlords would also fall within the same principle if no fair rent has ever been fixed in respect of them.

5 We are unable to agree that on the language of section 82 (2) of the Municipalities Act any distinction can be made between buildings the fair rent of which has been actually fixed by the Controller and those in respect of which no such rent has been fixed. It is perfectly clear that the landlord cannot lawfully expect to get more rent than the fair rent which is payable in accordance with the principles laid down in the Act. The assessment of valuation must take into account the measure of fair rent as determinable under the Act. It may be that where the Controller has not fixed the fair rent the municipal authorities will have to arrive at their own figure of fair rent but that can be done without any difficulty by keeping in view the principles laid down in section 4 of the Act for determination of fair rent. This would of course be with regard to the assessment of valuation for the period subsequent to the coming into force of the Act. For the prior period it would be the Rent Act in force during the year of assessment in the light of the provisions of which the figure of the fair rent would have to be determined and assessment made accordingly.

6 There is a good deal of confusion in the judgments of the trial Court and the first appellate Court with regard to the the Rent Acts the provisions of which

would have to be kept in view for the assessment of valuation for the purpose of section 82 (2) of the Municipalities Act. The decrees which have been granted suffer from the same infirmity. It has been pointed out by the learned Counsel for the respondents that according to the rules contained in the fourth Schedule to the Municipalities Act the assessment books have to be revised once in every five years and the quinquennial assessment thus made ensures for that period. But it appears from the rules that a procedure has been prescribed for changing the assessment whenever a case is made out for doing so. We are not concerned with the procedural difficulties which may be experienced, we have to declare what the law is and as appears to be well settled the assessment of valuation for the purpose of tax must be made in accordance with and in the light of the provisions of the Rent Act which would be in force during the period of assessment.

7 In the result the decrees which have been granted are hereby modified by declaring that the general revision made by the Guntur Municipality by increasing the rental valuation of houses and buildings beyond the fair rent determinable under the Rent Act in force for the period of assessment shall be illegal and *ultra vires* and a permanent injunction shall issue restraining the municipality from realizing any amount in excess of such tax which may be found due on the valuation fixed according to the principles laid down in our judgment. In view of the entire circumstances the parties are left to bear their own costs in this Court.

V K.

— Appeals dismissed

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*J.M. Shelat and C.A. Vaidialingam, JJ.*

Vizagapatam Dock Labour Board

.. *Appellant**

v.

Stevedores Association, Vishakhapatnam and others

.. *Respondents.*

(A) *Dock Workers (Regulation of Employment) Act, 1948 (IX of 1948), sections 2, 3, 5, 5-A, and 5-B and the Vizagapatam Dock Workers [Regulation of Employment] Scheme, 1959, clauses 2, 7, 9, 11, 14, 18, 30, 31, 33, 37, 43, 44, 46, 51 and 53—Scope—Employer-employee relationship, if exists between the Dock Labour Board and the dock labour workmen.*

From the various provisions of the Act and the Dock Workers (Regulation of Employment) Act, 1948, and the Vizagapatam Dock Workers (Regulation of Employment) Scheme, 1959, it is evident that the Dock Labour Board is a statutory body charged with the duty of administering the Scheme, the object of which is to ensure greater regularity of employment for workers and to secure that an adequate number of dock workers are available for the efficient performance of dock work. The Board is an autonomous body, competent to determine and prescribe the wages, allowances and other conditions of service of the dock workers. The purport of the Scheme is that the entire body of workers should be under the control and supervision of the Board. The registered employers are allocated monthly workers by the Administrative Body and the Administrative Body supplies whenever necessary, the labour force to the stevedores from the reserve pool. The workmen who are allotted to the registered employers are to do the work under the control and supervision of the registered employers and to act under their directions. The registered employers pay the wages due to the workers to the Administrative Body and the latter, in turn, as agent of the registered employers, pay them over to the concerned workmen. All these circumstances, *prima facie*, establish that

the Board cannot be considered to be the employer of the dock labour workmen. It is true that the functions of recruitment and registration of the dock labour force, fixation of wages and dearness allowance, payment of workmen's compensation, taking of disciplinary action and prohibition against the employment of workmen who are not registered with the Board are discharged by the Board under the Scheme. But on that account, the Board does not become the employer of the dock labour workmen. In fact the various provisions referred in the Scheme, clearly show that the registered employer to whom the labour force is allotted by the Board is the employer whose work of loading or unloading of ships is done by the dock workers allotted to them. [Paras. 23, 24 and 25.]

(B) *Dock Workers (Registration of Employment) Act (IX of 1948) and Vizagapatnam Dock Workers Scheme, 1959—Claim for works by dock workers union against Stevedores Association and its members—Board made a party—Board is not the employer—Nor does it carry on an industry—Award against the Board—Not proper.*

Having regard to the nature of the claim and the averments in the pleadings of the Workers Union as also on the basis on which the Tribunal itself has proceeded the claim for bonus has really been made against the Stevedores Association and its members; as such the Tribunal was not justified in making the Board liable. [Paras. 10 and 14.]

Further, it cannot be stated that the Board functioning under the Act and the scheme carries on any industry so as to attract the provisions of the Industrial Disputes Act. As the Board is neither the employer nor carries on any industry the Industrial Tribunal was wrong in directing the Board to pay the bonus claimed which has to be met by the actual employer. [Para. 30.]

Appeal by Special Leave from the Award dated the 24th May, 1968 of the Industrial Tribunal, Andhra Pradesh in I.D. No. 10 of 1967.

Niren De, Attorney-General for India, (*S.K. Dholakia, R.H. Dhebar and S.P. Nayar*, Advocates, with him), for Appellant.

K. Srinivasamurthy and Naunit Lal, Advocates, for Respondent Nos. 1 to 12.

* C.A. No. 2113 of 1968.

10th September, 1969.

B P Maheswari, Advocate, for Respondent No 13

The Judgment of the Court was delivered by

Vaidialingam, J—This appeal, by Special Leave, by the Vizagapatnam Dock Labour Board (hereinafter referred to as the Board), is directed against the award, dated 24th May, 1968 of the Industrial Tribunal, Andhra Pradesh, Hyderabad, in I D No 10 of 1967 holding that the appellant should pay the dock workers employed at Vizagapatnam Port bonus for the accounting years 1964-65, 1965-66 and 1966-67

2 The Central Government, by its order dated 13th April, 1967 referred for adjudication, to the said Tribunal, the question whether the demand for payment of bonus to Dock Labour Board workers, employed at Vizagapatnam Port for the accounting years 1964-65, 1965-66 and 1966-67 was justified and, if so, at what rate should such bonus be paid. The parties to the reference included the Board, the Vishakhapatnam Stevedores Association, certain individual Stevedores and two unions representing workers. The two unions were the Port Khalsis Union and the Dock Workers Union

3 Both the Unions filed statements of claim on behalf of their workmen. They referred to the demands made by them for payment of bonus and the rejection thereof by the Board and the Stevedores Association. They referred to certain agreements having been reached in respect of bonus between the workmen and the respective Stevedores Associations, in Calcutta, Cochin, Madras and Bombay. They claimed that the work done by the workmen at Vishakhapatnam Port was exactly similar to the type of work done by the Stevedores workmen at Bombay, Calcutta, Cochin and Madras and that therefore their claim for bonus was justified. They further referred to the fact that the Board and the Stevedores Association were all governed by the Dock Workers (Regulation of Employment) Act, 1948 (IX of 1948) (hereinafter referred to as the Act) and the Vizagapatnam Dock Workers (Regulation of Employment) Scheme, 1959 (hereinafter referred to as the Scheme), framed thereunder. The said Scheme is similar to the

Scheme obtaining in the areas where a settlement had been entered into regarding bonus and the relationship between the Stevedores and the Dock Labour Board was also the same in all ports. The Unions claimed bonus at 14 paise per ton for 1964-65, 15 paise per ton for 1965-66 and 16 paise per ton for 1966-67.

4 The Vishakhapatnam Stevedores Association and its member Stevedores filed statements contesting the claim of the workmen. After referring to some of the provisions of the Act and the Scheme, the Association urged that the Dock workers were the workmen of the Board as all the ingredients of master and servant existed as between the Board and the dock workers. The Association further urged that the dock labour workers were not the employees of the Stevedores and, as such no claims for bonus could be made as against the Stevedores Association or its members. The Association further pleaded that it was an unnecessary party to the reference and the workmen had no claim as against it in view of the fact that the Association or its members were not the employers of the dock workers. They also contested the claim of the workmen on merits

5 The Board, represented by its Chairman, filed a written statement contesting the claim of the Stevedores that they were not the employers of the dock workers. The Board claimed that it was a statutory body constituted under the Act and governed by the statutory Scheme in the discharge of its statutory functions. According to it none of the functions discharged by it under the Act or the Scheme could be characterised as 'carrying on of an industry' so as to attract the provisions of the Industrial Disputes Act. On the other hand, the Board urged that it was the Stevedores and their Association that carried on the stevedoring industry during the years for which a claim for bonus was made by the workmen and therefore, if at all the liability for payment of bonus should be that of the Stevedores and their Association. It further urged that the claim, having been made by the workmen against the Stevedores, the latter should not be allowed to convert the said claim into one against the Board. The Board also further pleaded that it was not a neces-

sary or proper party to the dispute. It filed an additional written statement pointing out that the Vishakhapatnam Stevedores Association had been appointed by the Central Government as the Administrative Body for the purpose of carrying on the day-to-day administration of the Scheme and that the said Administrative Body is deemed to act as an agent for the employers, as would be evident from the Scheme. After referring to the functions of the Administrative Body under the Scheme, the Board claimed that it had no further part to play in the proceedings before the Tribunal.

6. The Industrial Tribunal, after referring to the nature of the duties performed by the Board as well as the Stevedores Association and its members and their relationship with the Dock Labour Boards, held that it is the Board that is the employer of the dock workers and that the Board is liable for meeting the claim for bonus. The Tribunal has proceeded on the basis that the bonus claim by the workmen is 'tonnage bonus' because while loading or unloading cargo any particular gang or gangs of workmen may not be working continuously for a given period for a particular Stevedore and therefore the bonus that has to be paid to the dock workers must be on the basis of the tonnage handled by them. The Tribunal then considered the rate at which bonus is to be awarded for the three years. Ultimately it has held that the demand for bonus by the workmen for the three years in question is justified and it has to be paid by the Board at the rate of 13 paise per ton for the year 1964-65, at 14 paise per ton for the year 1965-66 and at 15 paise per ton for the year 1966-67.

7. The learned Attorney-General, on behalf of the appellant, raised two contentions: (i) That the Tribunal has acted illegally and without jurisdiction in making the Board liable for payment of bonus when the claim of the workmen for such payment was against the Stevedores Association and its members; and (ii) having due regard to the provisions of the Act and the Scheme and the functions discharged by the Board, the Tribunal should have held that there is no employer-employee relationship between

the Board and the dock labour workmen and, as such the Board could not be made liable for the claim.

8. Regarding the first contention, the learned Attorney-General invited our attention to the nature of the claim made by the two unions as well as the discussion contained in respect of such claim in the award. The Attorney-General also referred us to the plea taken by the Board in its written statement that a claim exclusively made by the dock workers as against the Stevedores should not be allowed by the Stevedores to be converted into a claim made as against the Board and that no award could be passed against the Board contrary to the claim of the workmen themselves.

9. Mr. K. Srinivasamurthy, learned Counsel appearing for the Stevedores Association, urged that the claim by the unions was for payment of bonus against the Board and therefore the Board has been properly made liable. Alternatively the Counsel urged that the claim by the unions was for payment of bonus and the Tribunal was perfectly justified in considering which party was liable to meet this claim. It was in considering such a claim that the Tribunal had held the Board to be liable.

10. Having due regard to the nature of the claim and the basis on which the Tribunal itself has proceeded, we are satisfied that the claim for bonus has been made by the unions specifically against the Stevedores Association and its members and, as such, the Tribunal was not justified in making the Board liable.

11. In the statement of claim filed by the Port Khalasis Union, in paragraph 2 it is stated that since the Stevedores are the registered employers of the Dock Labour Board, the bonus should be settled by the Stevedores Association only. In paragraph 14 the Union has stated that the plea of the Stevedores at Vishakhapatnam that they are not concerned with the demand for bonus since the workers are registered with the Dock Labour Board is wrong, baseless and aimed at confusing the issue. After referring to the agreements arrived at between the Stevedores workmen and the Stevedores at Bombay, Calcutta, Cochin and Madras, the Union has

stated in paragraph 15 that the Stevedores at Vishakhapatnam Port are in no way different and they cannot disclaim their responsibilities for payment of bonus to the workmen

12 Similarly, the Dock Workers Union in its statement, has referred to the fact that it has been agitating for many years for the introduction of payment of bonus as obtaining in Madras, Bombay, Calcutta and Cochin. The Union has further stated that the Stevedores of Vishakhapatnam are the employers registered in the Dock Labour Board as the real employers. It has further stated that the Stevedore companies are private employers who work for a consideration and derive large profits out of the employment and the operations of the Stevedore workers. The Stevedores have been resisting the claim of the workmen for payment of bonus and have been postponing consideration of the claim. The Union has further stated that payment of bonus can be made by the Board on behalf of the Stevedores and the Stevedoring business is very lucrative and profitable. The Union further prayed the Tribunal to summon the accounts of the Stevedores as the claim of the workmen regarding the financial position of the Stevedores will be fully found established.

13 The Stevedores Association no doubt has stated that the dock workers are the workmen of the Board as all ingredients of master and servant exist as between the Board and the dock workers. The Board has categorically stated in its written statement that the dock workers' claim against the Stevedores should not be allowed to be converted by the Stevedores into a claim against the Board. The Board has further specifically pleaded that no award could be passed against it contrary to the claim made by the dock workers themselves.

14 The various averments contained in the statements referred to above will clearly show that the claim for payment of bonus by the dock workers was essentially and in the main directed against the Stevedores Association and its members. Otherwise a reference by the Union to the prosperity and lucrative business conducted by the Stevedores and the large profits made by them will

have no relevancy at all. No doubt, here and there, there are certain averments regarding the Board, but so far as we could see, no specific claim for payment of bonus as against the Board has been made. On the other hand the claim is that the Board 'on behalf of the Stevedores in Vishakhapatnam' can pay the bonus claimed by the unions. The statement filed by the Stevedores Association also makes it clear that they understood the claim by the workmen as directed against them because it makes various averments to establish that the workmen have no claim as against them as the Stevedores Association or its members are not the employers of the workmen. The Board has specifically stated that a claim made against the Stevedores should not be converted into a claim made against the Board and no award can be passed contrary to the claim of the workmen themselves. That the Tribunal also understood that the claim of the workmen was against the Stevedores Association and its members is also evident from the statement in para 4 of the award where in the Tribunal observes as follows:

"The claimants claim bonus for the three years mentioned in the issue, and they claim that it should be paid by the Stevedores. They claim that it should be paid on the same basis as adopted at the other ports viz., Calcutta, Bombay, Madras and Cochin."

That the claim for bonus in the four areas referred to above was being met by the respective Stevedores Associations—though on the basis of agreement—is not in dispute. The observation extracted earlier shows that the Tribunal has also proceeded on the basis that the claim by the workmen has to be adjudicated upon on the basis that it is the liability of the Stevedores. But, unfortunately in the latter part of the award the Tribunal has mixed up the discussion regarding the liability of the Board or the Stevedores Association and has ultimately held that the Board is liable for payment of bonus. No doubt the basis for this conclusion is that the Board is the employer of the dock workers. The correctness of the view about the Board being the employer of the dock workers will be considered by us when we deal with the second contention of the learned Attorney-

General. To conclude on the first aspect the learned Attorney-General is well founded in his contention that in view of the pleadings and the nature of the claim made by the workmen the award making the Board liable for payment of bonus is not correct.

15. Normally, our decision accepting the first contention of the learned Attorney-General is enough to dispose of the appeal. But, as the Tribunal has adjudicated upon the contention of the Board that it is not the employer of the dock workers and held against it, we shall proceed to consider the second contention of the learned Attorney-General.

16. In order to appreciate the relationship between the Board, the dock workers and the Stevedores Association, it is necessary to refer to certain provisions of the Act and the Scheme. But before we do so, we can broadly set out how the work of loading and unloading of ships in the port of Vishakhapatnam is being done. The Board maintains a dock labour pool. The shipping companies have their agents at Vishakhapatnam. The Stevedores enter into contracts with the ship-owners for the loading and unloading of cargo. The contracts contain clauses regarding the rate per ton of cargo payable to the Stevedores who handle the loading or the unloading of cargo. The shipping agents inform the Stevedores about the ship that is due to arrive as also the nature and quantity of the cargo to be loaded or unloaded. The Stevedores inform the Board about the quantity of cargo to be loaded or unloaded and place an indent stating the approximate labour force that may be required for the said purpose. The Board supplies the labour force as asked for. Along with the labour force the Board deputs two supervisors who are called the loading mazdoors and the tindal. The Stevedores employ one Foreman for the entire operation of either loading or unloading. The duty of the Foreman appears to be to see that the cargo is not damaged and that it is properly handled by the labour force supplied by the Board. The Stevedores have to carry on the work with the labour force supplied by the Board and they cannot engage outside labour for the work. The Stevedores pay to the Board for the services of the workers

supplied by it. Over and above the wages due to the labourers and paid to the Board the Stevedores have also to pay 105 per cent. of the actual wages to the Board known as 'General and Welfare Levy'. The Board utilises this additional amount for making certain payments to the workers. The Stevedores cannot take any disciplinary action against the workmen but, on the other hand, they have to complain to the Board. The Board takes the necessary disciplinary action against the workers concerned. It fixes the rates of wages to be paid by the Stevedores and collects the same from them and pays to the workers. A particular gang of workmen may work for one Stevedore on a particular day and on the next day they may work for another Stevedore. In fact it may even happen that one gang of workmen work for different Stevedores in the course of the same day.

17. We shall now refer to the salient features of the Act and the Scheme. The object of the Act is to provide for regulating the employment of dock workers. Section 2 defines *inter alia* the expressions 'Board,' 'dock worker,' 'employer' and 'Scheme.' The expression 'dock worker' in brief means a person employed or to be employed in, or in the vicinity of any port on work in connection with the various matters referred to in the definition. 'Employer,' in relation to a dock worker, means the person by whom he is employed or to be employed as aforesaid. 'Scheme' has been defined to mean a Scheme made under the Act. Section 3 provides for the scheme being made for the registration of dock workers and employers with a view to ensuring greater regularity of employment and for regulating the employment of dock workers, whether registered or not, in a port. A perusal of clauses (a) to (k) of sub-section (2) of section 3 shows that the scheme may make provision for various matters which include regulating the recruitment and entry into the Scheme of dock workers, the registration of dock workers and employers, the employment of dock workers as well as the terms and conditions of employment, including rates of remuneration etc. The Scheme may also, provide for the manner in which, and the persons by whom, the cost of

operating the Scheme is to be defrayed as well as for constituting the authority to be responsible for the administration of the scheme. Section 5 provides for the Central Government or the State Government, as the case may be, when making a scheme, constituting an Advisory Committee to advise upon such matters arising out of the administration of the Act or any scheme made under it as well as regarding its composition. The Advisory Committee shall include an equal number of members representing the Government, the dock workers and the employers of dock workers and shipping companies. Section 5 A provides for the establishment of a Dock Labour Board by the Government for a port or group of ports, as well as its composition. Under section 5 B the Board is made responsible for administering the scheme for the port or group of ports for which it has been established and also the Board is to exercise such powers and perform such functions as may be conferred on it by the scheme.

18 The Central Government has framed a scheme under sub-section (1) of section 4 of the Act for the Port of Vizagapatam. Clause 2 states that the objects of the Scheme are to ensure greater regularity of employment for dock workers and to secure that an adequate number of dock workers is available for the efficient performance of dock work. The Scheme applies to the registered dock workers and registered employers. Clause 3 defines the various expressions. 'Daily worker' means a registered dock worker who is not a monthly worker. 'Monthly worker' means a registered dock worker who is engaged by a registered employer or a group of such employers on a monthly basis under a contract which requires for its termination at least one month's notice on either side. 'Dock employer' means a person by whom a dock worker is employed or is to be employed and also includes a group of dock employers formed under clause 14 (1) (d). 'Registered dock worker' means a dock worker whose name is for the time being entered in the employers' register. 'Reserve pool' means a pool of registered dock workers who are available for work and who are not for the time being in the employment of a registered employer or a group of dock employers as monthly

workers. Clause 5 provides for the Central Government appointing an Administrative Body for the purpose of carrying on the day-to-day administration of the Scheme. There is no controversy that the Vizhagapatnam Stevedores' Association, in this case, has been appointed as the Administrative Body.

19 Under clause 7 dealing with the various functions of the Board, the latter is authorised to take various measures for furthering the objects of the Scheme. The measures contemplated under sub-clauses (a) to (i) of clause 7 (1) include ensuring the adequate supply and the full and proper utilisation of the dock labour, regulating the recruitment and entry into and the discharge from the Scheme, of dock workers, the allocation of registered dock workers in the reserve pool to registered employers, maintaining the employers' registers and dock register of dock workers, the levying and recovering from registered employers, contributions in respect of the expenses of the Scheme, administering the Dock Workers Welfare Fund and recovering from registered employers contribution for such fund, administering a Provident Fund and a Gratuity Fund for registered dock workers in the Reserve Pool. The various functions enumerated show that the Board's primary responsibility is the administration of the Scheme and to see that the work in the dock is properly done and the labour employed for such purpose is not exploited. Among the responsibilities and duties enumerated in clause 8 are the fixing of the number of dock workers to be registered under various categories, considering registration of new employers, determination of the wages, allowance and other conditions of service and fixing the rate of contribution to be made by registered employers to the Dock Workers Welfare Fund. Under clause 9 (1) (k), the Chairman of the Board is given power to take disciplinary action against registered dock workers and employers in accordance with the provisions of the Scheme. Under clause 11, the Administrative Body has been made responsible for the administration of the Scheme and in particular of the various matters mentioned in sub-clauses (a) to (f). Sub-clause (e) thereof provides for the Administrative Body allocating registered dock workers in

the reserve pool who are available for work to registered employers and for this purpose, under clause (i) thereof the Administrative Body is deemed to act as an agent for the employer. Sub-clauses (i) and (ii) of clause (f) cast the duty on the Administrative Body of collecting the levy, contribution to the Dock Workers Welfare Fund or any other contribution from the employers as may be prescribed under the Scheme, as well as the collection of the registered dock workers' contribution to the Provident Fund, Insurance Fund or any other fund which may be constituted under the Scheme. Sub-clause (iii) makes the Administrative Body responsible for payment as agent of the registered employer to each daily worker of all earnings properly due to the dock worker from the employer and the payment to such workers of all monies payable by the Board to those workers in accordance with the Scheme. Two points emerge from clause 11 *viz.*, that when allocating registered dock workers in the reserve pool for work to registered employers, the Administrative Body is deemed to act as agent for the employer; and the payment to each daily worker of all earnings properly due to him from the employer is made by the Administrative Body as agent of the registered employer.

20. Clause 14 deals with the maintenance of Employers' Register and the Workers' Registers. Clause 18 deals with promotion and transfer of workers. Sub-clause (3) thereof deals with the transfer of a monthly worker to the reserve pool at the request of the employer or the worker, but such transfer is made subject to the fulfilment of any contract subsisting between the monthly worker and his employer. Sub-clause (4) provides for considering the request for transfer to a reserve pool by a monthly worker whose services have been terminated by his employer for an act of indiscipline or misconduct.

21. Clauses 30, 31 and 33 deal with the payment of guaranteed minimum wages to a worker in the reserve pool register, payment of attendance allowance and disappointment money to such worker, respectively. Clause 36 deals with the obligations of registered dock workers and clause (2) thereof states that a

registered worker in the reserve pool who is available for work shall be deemed to be in the employment of the Board. We have already seen that under clause 11 (e), when allocating registered dock workers in the reserve pool for work to registered employers, the Administrative Body shall be deemed to act as an agent for the employer. Under sub-clause (5) of clause 36 a registered dock worker when allocated for employment under a registered employer is bound to carry out his duties in accordance with the directions of such registered employer or his authorised representative or supervisor and the rules of the port or place where he is working. Clause 37 enumerates the obligations of registered employers. They are prohibited from employing a worker other than a dock worker who has been allocated to him by the Administrative Body under clause 11 (e). The registered employers are also bound to pay the Administrative Body the levy under clause 51 (1) as well as the gross wages due to a daily worker. They are also bound to make contributions to the Dock Workers Welfare Fund under clause 53.

22. Clause 38 deals with restriction on employment. Registered employers are prohibited from engaging workers on dock work unless they are registered dock workers. It also prohibits persons other than registered employers employing any worker on dock work. Under clause 40 it is provided that it shall be an implied condition of contract between a registered worker (whether in the reserve pool or on the monthly register) and a registered employer that the rates of wages, allowances and overtime, hours of work shall be such as may be prescribed by the Board for each category of workers and the fixation of wage periods etc., shall be in accordance with the provisions of the Payment of Wages Act, 1936. Clause 44 deals with disciplinary procedure to be followed in taking action against a registered employer and a registered dock worker. Clause 46 deals with termination of employment. Clause 51 provides for the cost of operating the Scheme being defrayed by payments made by registered employers to the Board. It provides for the registered employer paying to the Board such amount by way of levy in respect

of the reserve pool workers when paying the gross amount of wages due from them under clause 37 (5) (i). Clauses 52 and 53 provide for Provident Fund and Gratuity and Dock Workers Welfare Fund respectively.

23 We have rather elaborately gone into the various matters dealt with under the Act and the Scheme as that will give a true picture of the nature of the functions and duties that the Board discharges in respect of the work carried on in the port. From the various provisions of the Act and the Scheme referred to above, it is evident that the Board is a statutory body charged with the duty of administering the Scheme the object of which is to ensure greater regularity of employment for dock workers and to secure that an adequate number of dock workers are available for the efficient performance of dock work. The Board is an autonomous body, competent to determine and prescribe the wages, allowances and other conditions of service of the dock workers. The purport of the Scheme is that the entire body of workers should be under the control and supervision of the Board. The registered employers are allocated monthly workers by the Administrative Body and the Administrative Body supplies whenever necessary, the labour force to the Stevedores from the reserve pool. The workmen who are allotted to the registered employers are to do the work under the control and supervision of the registered employers and to act under their directions. The registered employers pay the wages due to the workers to the Administrative Body and the latter, in turn, as agent of the registered employers, pay them over to the concerned workmen.

24 All these circumstances, in our opinion, *prima facie* establish that the Board cannot be considered to be the employer of the dock labour workmen. In fact the various provisions referred to in the Scheme clearly show that the registered employer to whom the labour force is allotted by the Board is the employer whose work of loading or unloading of ships is done by the dock workers allotted to them.

25 Mr Srinivasamurthy, learned Counsel for the respondents, referred us to certain circumstances to support his contention that the relationship of em-

ployer-employee exists between the Board and the dock workers. Some of those circumstances are recruitment and registration of the dock labour force, fixation of wages and dearness allowance, payment of workmen's compensation, taking of disciplinary action and prohibition against employment of workmen who are not registered with the Board. These circumstances, in our opinion, do not establish a relationship of employer and employee between the Board and the dock labour. The functions referred to above are discharged by the Board under the Scheme, the object of which, as mentioned earlier, is to ensure greater regularity of employment for dock workers and to secure that an adequate number of dock workers is available for the efficient performance of dock work. It is with this purpose in view that the Scheme has provided for various matters and considerable duties and responsibilities are cast on the Board in this regard. But we have also already pointed out that under sub-clause (5) of clause 36 a registered dock worker when allotted for employment under a registered employer, shall carry out his duties in accordance with the directions of such registered employer and clause 11 (d) also makes it clear that in the matter of allocation of registered dock workers in the reserve pool to registered employers, the Administrative Body shall be deemed to act as agent for the employer. Though the contributions for the Dock Workers' Welfare Fund as well as the wages and other earnings due to a worker are paid by the registered employer to the Board at the rates fixed by it, the latter passes on the same to the dock worker concerned, as agent of the registered employer, under clause 11 (f) (iii). Further, the definition of the expression 'dock worker' and 'employer under section 2 (b) and (c) respectively of the Act and the definition of 'dock employer' and 'monthly worker' in clauses 3 (g) and (k) respectively of the Scheme and the obligation cast under section 36 (5) of the Scheme on a registered dock worker when allocated for employment under a registered employer to carry out his duties in accordance with the directions of the latter and the provisions contained in clause 37 (5) of the Scheme regarding payment by a registered employer to the Administrative Body of the gross wages due to the dock

worker and the implied condition of contract between the registered dock worker and the registered employer under clause 40, read along with the provisions regarding the functions of the Board, in our view, clearly lead to the conclusion that the Board cannot be considered to be the employer of the dock workmen and there is no relationship of master and servant between the two.

26. Mr. Srinivasamurthy, learned Counsel, referred us to the decision of this Court in *Kirloskar Oil Engines v. Hanmant Laxman Bibawe*¹, in which according to him, an inference of relationship of master and servant was not drawn, though for all practical purposes a person was working under the directions of another. The question that arose for consideration in that case was whether a watchman deputed to work by the Police Department under a private individual on the basis of a Scheme could be considered to be the employee of the latter, after considering the salient features of the scheme framed by the Police Department and after observing that a decision on the question as to the relationship of employer-employee has to be determined in the light of relevant facts and circumstances and that it would not be expedient to lay down any particular test as decisive in the matter, this Court held that a relationship of master and servant, between the watchman and the private employer, did not exist, notwithstanding the fact that the private employer was entitled to issue orders to the watchman deputed to work under him. The scheme dealt with in this decision was entirely different from the Scheme before us.

27. The learned Counsel then referred us to a decision of a Single Judge of the Kerala High Court in *C. V. A. Hydross and Sons v. Joseph Sanjon*². That decision had to consider the question regarding payment of retrenchment compensation to certain workmen who had registered themselves as workmen under the Dock Labour Board. They had filed a claim against the permanent Stevedores under whom they were working originally. The learned Judge, after a consideration of the Scheme framed for the Cochin Port, which is substantially similar to the

one before us, held that the Board was the employer of the workmen. We are not inclined to agree with this decision.

28. We may also refer to the decision of the Calcutta High Court in *A.C. Roy and Co. Ltd. v. Taslim*¹. There is no doubt the question arose in respect of a claim under the Workmen's Compensation Act, 1923. The learned Chief Justice, after a brief analysis of the Act and the Scheme framed for the Calcutta Port, held that when the Administrative Body of the Board allocated a worker in the Reserve Pool to the registered employer, then for the time being and for the purpose of the work concerned, that worker becomes an employee under the registered employer; and in that decision the Court came to the conclusion that the particular worker concerned was at the material time under the employ of the Stevedore. When that is the position with regard to a workman in the Reserve Pool, it stands to reason that the monthly worker who is engaged by a registered employer under a contract on a monthly basis is an employee of such registered employer.

29. The matter can also be considered from another point of view, *viz.*, can it be stated that the Board is carrying on an industry, so as to attract the provisions of the Industrial Disputes Act? We have already referred to the various circumstances which will show that there is no employment as such of the dock worker by the Board. As observed by this Court in *Gymkhana Club Union v. Management*²:

“What matters is not the nexus between the employee and the product of the employer's efforts but the nature of the employer's occupation. If his work cannot be described as an industry his workmen are not industrial workmen and the disputes arising between them are not industrial disputes. The cardinal test is thus to find out whether there is an industry according to the denotation of the word in the first part. The second part will then show what will be included from the angle of employees.”

Dealing with the definition of ‘industry’, this Court further observed:

1. (1967) 71 C.W.N. 531.

2. (1968) 2 An.W.R. (S.C.) 6 : (1968) 2 M.L.J. (S.C.) 6 : (1968) 2 S.C.J. 138 : (1968) 1 S.C.R. 742, 752.

1. (1953) 3 S.C.R. 514.

2. (1967) 1 L.L.J. 509.

"The definition of 'industry' is in two parts. In its first part it means any business, trade, undertaking, manufacture or calling of employers. Thus part of the definition determines an industry by reference to occupation of employers in respect of certain activities. These activities are specified by five words and they determine what an industry is and what the cognate expression 'industrial' is intended to convey. Thus is the denotation of the term or what the word denotes. We shall presently discuss what the words 'business, trade, undertaking, manufacture or calling' comprehend. The second part views the matter from the angle of employees and is designed to include something more in what the term primarily denotes. By the second part of the definition any calling, service, employment, handicraft or industrial occupation or avocation of workmen is included in the concept of industry. Thus part gives the extended connotation. If the activity can be described as an industry with reference to the occupation of the employers, the ambit of the industry, under the force of the second part, takes in the different kinds of activity of the employees mentioned in the second part. But the second part standing alone cannot define 'industry'. An industry is not to be found in every case of employment or 'service'."

Dealing with the expression 'industrial dispute' in the Industrial Disputes Act, this Court further proceeds to state, in the above decision, at page 757:

"the words are 'industrial dispute' and not 'trade dispute'. Trade is only one aspect of industrial activity, business and manufacture are two others. The word also is not industry in the abstract which means diligence or assiduity in any task or effort but a branch of productive labour. This requires co-operation in some form between employers and workmen and the result is directly the product of this association but not necessarily commercial."

and wound up the discussion, at page 758, thus:

"Industry is the nexus between employers and employees and it is this nexus

which brings two distinct bodies together to produce a result."

30 Applying the above principles to the case on hand, in our opinion it is clear that it cannot be stated that the Board, functioning under the Act and the Scheme carries on any industry so as to attract the provisions of the Industrial Disputes Act. As a claim for any type of bonus can be met only from the actual employer in respect of any industry and as we have held that the Board is neither the employer nor carries on any industry, it follows that the Industrial Tribunal was wrong in directing the Board to pay bonus for the years in question. In this view the order of the Industrial Tribunal, dated 24th May, 1968 has to be set aside. But, as the claim of the workman against the Stevedores Association and its members who are parties to the Reference has to be considered and adjudicated by the Industrial Tribunal, I D No 10 of 1967 has to be remanded to the Industrial Tribunal concerned for disposal according to law. The Tribunal will be at liberty to call upon the parties concerned to file supplementary statements and permit them to adduce further evidence, oral and documentary, which may be considered necessary, but it is made clear that the Dock Labour Board, the appellant will be completely out of the picture in the remand proceedings.

31 In the result, the order of the Industrial Tribunal, Andhra Pradesh, Hyderabad, dated 24th May, 1968 is set aside and this appeal allowed. I D No 10 is remanded to the said Tribunal to be dealt with and disposed of, according to law and the directions contained in this judgment. Parties will bear their own costs of this appeal.

V M K

Appeal allowed,
award set aside
and matter
remanded

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. Shah, K. S. Hegde and A. N. Grover, JJ.

Purtabpore Company Ltd. ... Appellant*
v.

State of Uttar Pradesh ... Respondent.

United Provinces Agricultural Income-tax Act, 1948 (III of 1949), section 6 (2) (b) (iv)—Agricultural income—Computation of—Deductions—Expenses in raising the crop, in making it fit for market and transportation, etc.—Assessee, carrying on large-scale agricultural farming in sugar—Staff establishment—Housing facilities—Repairs—Vehicles—Staff allowance—Provident fund—Periodicals—If and when allowable deduction.

The assessee, a sugar factory, carrying on agricultural farming on large-scale and having several farms and engaging on each farm a manager with necessary technical, clerical and menial staff to assist him, for the relevant assessment year, claimed deduction of the following expenditure: staff establishment, travelling expenses, staff allowances, garden maintenance, motor-car maintenance, contribution to provident fund, agency allowance, subscription and periodicals, postage and telegrams, etc., etc. The authorities under the Act disallowed the expenditure on the ground that the expenses could not strictly be called expenses of 'cultivation and were not permissible under section 6 (2) (b) (iv) of the Act. The High Court in reference also held against the assessee on the ground that the expenses could not possibly be said to be directly or proximately connected with the raising of crops nor for making it fit for market or for transporting it to the market. The assessee appealed.

Held, that the amount claimed by the assessee as expenses can be allowed under section 6 (2) (b) (iv) if and to the extent it is determined that they were incurred for the management, supervision, organisation, technical knowledge, and assistance and other allied matters for the purpose of the raising of crops, their marketing and transportation. [Para. 12.]

In modern agricultural farming which has become mechanised, involving a high degree of organization, technical skill, if optimum results are wanted, there should be proper supervisory and other staff. Expenses on residential accommodation for staff, repairs for such building, medical attention and other amenities, benefit of provident fund, provision of motor vehicles for the supervisory staff, postage, printing stationery, periodicals to obtain technical knowledge and up-to-date information in the matter of agricultural farming may have to be allowed.

[Para. 10.]

What has to be essentially determined under section 6 (2) (b) (iv) is whether the expenses were incurred on or for the purpose of the entire work and operations involved in raising the crops, making the same fit for marketing and the transportation of the produce to the market. Section 6 (2) (b) (iv) is not to be construed in a narrow and pedantic sense and must be given its full effect in the background of modern large-scale farming and the organization required for it. The words "raising the crops" cannot be confined simply to the ploughing of land, sowing seed and cutting the harvest. [Para. 10.]

Appeals by Special Leave from the Judgments and Orders, dated the 30th September, 1965 and 23rd November, 1965, of the Allahabad High Court in Agricultural Income-tax Reference Nos. 142 of 1954 and 232 of 1957.

Gopinath Kunzru, Senior Advocate, (V. K. S. Chaudhury, and Ganpat Rai, Advocates, with him), for Appellant (In both the Appeals).

C. B. Agarwala, Senior Advocate, (O. P. Rana, Advocate, with him), for Respondent (In both the Appeals.).

The Judgment of the Court was delivered by

Grover, J.—These appeals by Special Leave arise out of a common judgment of the Allahabad High Court in two references made under the United Provinces Agricultural Income-tax Act, 1948 (hereinafter called the Act).

2. As the points are common, the facts in Appeal No. 1276 of 1966 may be briefly stated :

* C. As. Nos. 1192 and 1276 of 1966

28th April, 1970.

The appellant is a sugar factory to which is attached a sugarcane farm. The appellant carries on agricultural farming on a large scale in District Deoria and had several farms. According to the case of the appellant it engages on each farm a manager with necessary technical, clerical and menial staff to assist him. These persons are also provided accommodation and facilities for medical treatment and are given certain other necessary allowances. It is claimed that the whole establishment is maintained exclusively for the purposes of the farm.

3 The appellant opted to be assessed under section 6 (2) (b) of the Act for the assessment year 1957 F, the Assessing Income-tax Officer (Collector) assessed the appellant to agricultural income-tax after disallowing expenses on the management charges of European Establishment, etc., miscellaneous expenses salary of European staff, rent, inspection, repairs of bungalows and offices as not being admissible, under the rules. This order was upheld by the Agricultural Income tax Commissioner mainly on the ground that the number of persons employed and their salary was not given and it was therefore not possible "to determine whether those persons were at all necessary when the assessee had too many other servants or labourers or the like". He disallowed the expenses on management and establishment and on the subscription on periodicals, on postage and telegram, printing and stationery, medicine etc. In his opinion these could not be regarded as costs of cultivation. A revision was filed before the Agricultural Income tax Board which was dismissed on the ground that the aforesaid expenses could not strictly be called expenses of cultivation and were not permissible under section 6 (2) (b) (iv) of the Act. The appellant filed an application under section 24 (2) for reference to the High Court. The Agricultural Income tax Board stated the following question of law

"Whether the amount claimed by the assessee as expenses of management, miscellaneous expenses detailed above can be allowed as expenses of cultivation under section 6 (2) (b) (iv) of the Act

4 The items which had been disallowed and with regard to which the reference was made are given below

Senior Staff Establishment	Rs 3 180—0—0
Indian Establishment	Rs 4 021—15—3
Indian Menial Staff	Rs 6 825—6—0
Travelling Expenses	Rs 833—6—3
Staff Allowance	Rs 207—7—6
Garden Maintenance	Rs 1 062—2—3
Motor Car Maintenance	Rs 360—0—0
Lighting Plant Expenses	Rs 1 844—11—0
Firm Contribution to Provident Fund	Rs 574—1—0
Agency Allowance	Rs 1 800—0—0

The assessee had showed certain other expenses as miscellaneous expenses. They too were disallowed. They were as follows —

Subscription and Periodicals	Rs 159—0—0
Postage and Telegrams	Rs 189—5—0
Printing and Stationery	Rs 79—14—0
Medicines and Medicals	Rs 1 529—3—8
Sundries	Rs 2 838—3—8

5 The High Court relied largely on certain decisions of this Court in which the meaning of "agricultural" and "agricultural purpose" was considered with reference to the provisions of the Income-tax Act, 1922. It was held by the High Court that the expenses which were claimed to be deductible could not possibly be said to be directly or proximately connected with the raising of the crops, nor for making it fit for market or for transporting it to the market. These expenses at best could only be said to be remotely connected with the business side of marketing the produce and had no connection with the raising of the crops. The question was therefore answered in the negative and against the assessee.

6 The Act was enacted to impose tax on agricultural income in the United Provinces. Section 2 (1) defines "agricultural income". It is first stated that this expression has the same meaning as has been assigned to it in the Indian Income-tax Act, 1922. In its adapted form it is reproduced below

"(a) any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in (Uttar Pradesh) or is subject to a local rate or cess assessed and collected by an officer of the State Government

(b) Any income derived from such land by—

(i)

(ii)

(iii)

(c) any income derived from any building

7. Section 3 provides for the charge of agricultural income-tax, section 4 (A) for computation of agricultural income, section 5 for determination of such income and section 6 gives an option to the assessee to have the computation of income done in accordance with its provisions. Sub-section 2 (b) says that the income shall be the gross proceeds of sale of all the produce of the land subject to the following deductions :—

“(i)

(ii)

(iii)

(iv) the expenses incurred in the previous year in raising the crop from which the agricultural income is derived, in making it fit for market and in transporting it to market, including the maintenance or hire of agricultural implements and cattle required for these purposes ;

(v)

(vi)

(vii) any expenses incurred in the previous year on the maintenance of any capital asset if such maintenance is required for the purpose of deriving the agricultural income”.

8. The provisions of section 6 (2) (b) (iv) came up for consideration before the Allahabad High Court in Agricultural Income-tax Reference No. 366 of 1953 decided on 11th May, 1956. In that case also the income was derived from large-scale farming. It had been found by the Agricultural Income-tax Board that the farm had been run under the supervision of a manager and all the figures relating to receipts and expenditure had been properly checked and scrutinized. A number of items were involved which were of an identical nature as are to be found in the present case and with regard to which deductions had been claimed under section 6 (2) (b). The provident fund which represented the company's contribution was allowed by the High Court on the ground that the employees were engaged at the farm and the contribution to their provident fund was in a way remuneration or salary paid to them. The expenses on the maintenance and repairs to the assistant manager's bungalow were allowed under section 6 (2) (b) (vii). Similarly the expenditure incurred on repairs to quarters allowed to blacksmiths, watchman, carpenters and clerks

—all connected with cultivation was allowed under the aforesaid provision. The expenses incurred on the maintenance of a lorry used for transporting the harvest and the car which was provided to the managerial staff to ensure proper supervision of the farm were also allowed by the High Court. It was considered that this expenditure was necessary for the purpose of deriving the agricultural income. As regards the payments made to directors, managing agents and expenses incurred on a general office and the general manager's commission, the position taken up on behalf of the assessee was that all this expenditure had been incurred on controlling operations in the organization for the cultivation of land, raising, transporting and marketing of the crops etc. The High Court was of the view that all this expenditure which represented only 1/5th of the total expenditure of the company was deductible as it had been incurred for the purposes of the farm. As regards manager's salary, his travelling expenses, leave and passage allowance and clerical salaries, the High Court felt that unless there be reasons for holding that the expense was no unreasonable as to justify a finding that it did not relate to the agricultural activities of the company, the assessing authority could not substitute its own views of prudent management for the actual management by the Board of Directors of the company. The following observations may be referred to :

“The actual raising of the crop is certainly done by the coolies who work on the farm but the brains that direct and guide the operations, protect the crops and arrange for its collection and disposal, are by no means to be ignored and if payment is made by the company to secure such assistance we do not find any justification for holding that the expense is not incurred in raising the crops ”

The above case was not followed by the High Court in the present case.

9. *Mrs. Bicha F. Guzdar, Bombay v. Commissioner of Income-tax, Bombay*¹, the questions which fell for determination were of a different nature altogether. The assessee there was a shareholder in certain tea companies 60 per cent. of

1 (1955) 1 MLJ (SC) 27 : 1955 SCJ 68 : (1955) 1 SCR 876 : (1955) 27 I.T.R. 1 : AIR 1955 SC 74

whose income was exempt from tax as agricultural income under section 4 (3) (viii) of the Indian Income tax Act, 1922. The assessee claimed that 60 per cent of the dividend income received on those shares would also be exempt from tax as agricultural income. It was held that the dividend income was not agricultural income but was income assessable under section 12 of the aforesaid Act. According to that decision, the object underlying section 2 (1) of the Income-tax Act was not to subject to tax either the actual tiller of the soil or any other person getting land cultivated by others for deriving benefit therefrom, but to say that the benefit intended to be conferred upon such persons should extend to those into whose hand that revenue fell, however remote the receiver of such revenue might be, was hardly warranted. In the other case, *Commissioner of Income tax, West Bengal, Calcutta v Raja B. Noy Kumar Suhag Roy*¹, the question was whether income derived from the sale of sal and pyasal trees in the forest owned by the assessee which was originally a forest of spontaneous growth "not grown by the aid of human skill and labour" but on which forestry operations described in the statement of case had been carried on by the assessee involving considerable amount of expenditure of human skill and labour was agricultural income within the meaning of section 2 (1) of the Indian Income tax Act, 1922. It was in this connection that observations were made with regard to the primary sense in which the word "agriculture" was used and what the meaning of "agricultural operation" was. It was said that the term "agriculture" could not be extended to all activities which had some relation to the land and were in any way connected with the land. For instance the application of the term "agriculture" to denote such activities in relation to the land including horticulture, forestry, breeding and rearing of live stock, dairying, butter and cheese making and poultry farming was unwarranted distortion of the term.

10 The above two decisions relied upon by the High Court, with respect have no

bearing on the question which arose in the present case. It is well known that modern agricultural farming which has become mechanised involves a high degree of organisation, technical skill etc., in the same way as a well-run industry. If agricultural production has to be obtained with optimum results it is necessary that there should be a proper supervisory and other staff as also the employment of such means as would be conducive of maximum production and proper marketing of the produce. It is axiomatic that the staff would require residential accommodation which will have to be kept in a proper state of repairs. The staff will also need medical attention and other amenities which are normally afforded to employees now-a-days. The benefit of provident fund can hardly be denied to them when it has become the accepted and normal feature in all forms of employment in modern times. If any motor vehicle is being maintained for enabling the supervisory or other staff to look after the farm the expenses incurred thereon cannot be regarded as foreign to farming operations. The expenditure incurred on postage, telegrams, printing and stationery for the purpose of and in connection with farming would also be allowable. If certain periodicals are being subscribed to for obtaining technical knowledge and up-to-date information in the matter of agricultural farming it is difficult to see how that could be disallowed. It is not necessary to refer to all other items the details of which have been given before. What has to be essentially determined under section 6 (2) (b) (iv) is whether the expenses were incurred on or for the purpose of the enterprise work and operations involved in raising the crops, making the same fit for marketing and the transportation of the produce to the market. The words "raising the crop" cannot be confined simply to the ploughing of the land, sowing the seed and cutting the harvest. It must be emphasised that section 6 (2) (b) (iv) is not to be construed in a narrow and pedantic sense and must be given its full effect in the background of modern large scale farming and the organisation required for it. We are generally in agreement with the views expressed in the previous unreported decision of the Allahabad High Court referred to before.

1 (1957) 32 I.T.R. 466, 1957 S.C.J. 740
1958 S.C.R. 101 (1957) 2 A.W.R. (S.C.) 145
(1957) 2 M.L.J. (S.C.) 145

11. It would appear that the authorities concerned have not considered the items in dispute from the correct angle and it would have to be decided with regard to each item whether it was partly or wholly expended for the purposes mentioned before. An apportionment may become necessary if it is determined that the entire expense was not incurred strictly for those purposes.

12. The correct answer to the question referred would be: the amount claimed by the assessee as expenses on management and miscellaneous expenses detailed before can be allowed under section 6 (2) (b) (iv) if and to the extent it is determined that they were incurred for the management, supervision, organisation, technical knowledge and assistance and other allied matters for the purpose of the raising of crops, their marketing and transportation, in the light of the observations made by us in this judgment.

The appeals are allowed with costs in this Court and the judgment of the High Court is set aside. One hearing fee.

V.S. — Appeals allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*J. M. Shelat, C. A. Vaidialingam and I. D. Dua, JJ.*

Remington Rand of India Ltd.

.. Appellant *

v.

The Workmen ... Respondents.

Labour Law—Gratuity—Qualifying period for gratuity—Distinction between cases of resignation and retirement and cases of dismissal for misconduct in the matter of the qualifying period for gratuity, if could be sustained.

Once the principle that gratuity is paid to ensure good conduct throughout the period that the workman serves his employer is accepted, some distinction in the matter of the qualifying period between cases of resignation and retirement on the one hand and dismissal for misconduct on the other becomes logically necessary. Such

a distinction cannot legitimately be assailed as unreasonable. Similarly, if the object underlying schemes of gratuity is to secure industrial harmony and satisfaction among workmen it is impossible to equate cases of death, physical incapacity, retirement and resignation with cases of termination of service on account of misconduct. Besides, a longer qualifying period in the latter cases would ensure restraint against wilful use of violence and force, neglect etc. [Para. 18.]

Appeal by Special Leave from the Award, dated the 28th February, 1966 of the Industrial Tribunal, Madras in I.D. No. 21 of 1965.

H. R. Gokhale, Senior Advocate (*D. N. Gupta*, Advocate, with him), for Appellant.

M. K. Ramamurthi, Senior Advocate, (*Mrs. Shyamala Pappu and Vineet Kumar*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Shelat, J.—On demands for revision of wage-scales, dearness allowance, medical benefit, bonus for the year 1963-64, gratuity etc. having been made by the workmen of the appellant-company in its Madras and the other branches in that region and disputes thereabout having arisen between the company and its said workmen, the Government of Madras referred them by its notification, dated 6th April, 1965 for adjudication to the Industrial Tribunal, Madras. The Tribunal granted some and rejected the rest of the demands. Aggrieved by the award the company filed this appeal under Special Leave granted by this Court.

2. Though the award dealt with a number of demands Counsel for the appellant-company restricted its challenge against the award on three subjects only. Consequently, we are concerned in this appeal with those three subjects only, namely, bonus for the year 1963-64, medical benefits and revision by the Tribunal of the company's existing gratuity scheme.

3. As regards the bonus, the company had already paid to the workmen bonus at the rate of 4 months basic pay as against the demand for the maximum bonus calculated in accordance with the Payment

* C.A. No. 1551 of 1966.

17th October, 1969.

of Bonus Act, 1965, and on consolidated as against the basic wages. The Tribunal conceded that demand and granted bonus at 20 per cent of the consolidated wages. In view, however, of this Court's decision in *Jalan Trading Co v Mill Mazdoor Union*¹, Mr Ramamurthi for the workmen conceded that the Act cannot apply in respect of the year in question and that the bonus payable for that year will have to be calculated on the basis of the Full Bench Formula as approved by this Court. The award to that extent, therefore, has to be set aside and remanded to the Tribunal for determining the bonus in accordance with the said Formula.

4 On the question of medical facilities the workmen's demand is contained in paras 27 to 31 of their statement of claim filed before the Tribunal according to which the workmen wanted the company to reimburse all medical expenses incurred by them on production of bills therefor. In paras 27 and 28 of the statement, it was stated that the company had a scheme for medical benefit for its workmen at Calcutta made under the consent award of 1962 and that there was no reason 'why this amenity should be refused to the workmen in this region'. Para 30 of the statement stated that there was a discussion between the parties regarding this demand when the company agreed to appoint a medical officer for consultation by the workmen and also to meet the cost of medicines upto Rs 100 for a workman per year. This offer, however, was rejected on three grounds: (1) that the condition as to the ceiling was discriminatory, (2) that the ceiling was too low and (3) that there was no warrant for not extending the benefit to workmen of the branch offices outside Madras.

5 This demand is dealt with by the Tribunal in para 14 of the award. It is clear therefrom that the union's contention before the Tribunal was that there was no reason why 'this amenity of medical facility which the company has granted to its Calcutta workmen should be refused to the workmen of the Madras region'. The contention thus clearly was that the company having made a scheme for its Calcutta employees, it was discriminatory

to refuse such a scheme to its workmen in Madras region. It is equally clear that the offer made by the company and referred to in the statement of claim by the workmen was rejected as it contained a ceiling which was not in its Calcutta scheme, and it was therefore, that its offer was considered discriminatory. In view of these contentions the Tribunal agreed that a scheme for medical benefit for this region was called for. The Calcutta scheme was not produced before the Tribunal and therefore the Tribunal proceeded to frame its own scheme. The Tribunal rejected the demand for reimbursement of all medical expenses in respect of which bills would be produced as it felt that such a provision would lead to abuses including the obtaining of false bills. Instead, the Tribunal directed that the company should pay the cost of such medicines as are prescribed by the company's doctor, if supported by genuine bills and should also pay all cost of hospitalisation if and when it was recommended by the company's doctor.

6 Counsel for the company objected to this part of the award on the grounds (1) that the Tribunal was not justified in throwing on the company the entire burden of medical expenses including the cost of hospitalisation even in cases of major diseases which workmen might suffer or contract, (2) that it was no part of the employer's obligation to provide for such expenses and that too to an unlimited degree, and (3) that the award should have provided a ceiling both in respect of the cost of medicines and of hospitalisation. The argument was that the grievance of the workmen was that denial of the medical amenity to them as the one given to its Calcutta workmen was discriminatory, and therefore, if the Tribunal decided to concede the demand, it should have been on the same lines as the Calcutta scheme. Mr Ramamurthi, on the other hand, contended that (a) it was an accepted principle that though a company may have an all India organisation it was not necessary that it should have uniform conditions of service in all the regions and that therefore merely because the company has a medical scheme for its Calcutta office it did not follow that that scheme must also be applied to its workmen in Madras region, and (b) that the scheme framed by the Tribunal was

fair and should not be interfered with in order only to bring it in line with that of Calcutta.

7. In a recent decision concerning this very company and its workmen in Bangalore, Hyderabad and Kerala branches *Remington Rand of India v. The Workmen*¹ this Court had to consider this very question. The Tribunals in those cases had, as in this case, made schemes which imposed the burden of medical facilities on the company without any ceiling and extended therein such benefit to the family members of the workmen also. In those cases, on our finding the company's Calcutta scheme to be fair and reasonable, we substituted it for the schemes framed by the respective Tribunals. The Calcutta scheme is thus in operation in those areas also. Counsel for the workmen has not shown to us any substantial difference between those areas and the Madras region affecting the question of medical benefit. We, therefore, find no legitimate reason why the Calcutta scheme should not be applied to these workmen. It is true that medical benefit is excepted in that scheme for certain diseases of a contagious and epidemic nature. That presumably was done on the ground that for such diseases the primary duty to give relief is of the State and not of the employer. For the reasons given in that decision, we set aside the directions given by the Tribunal in this behalf and substitute them by the following scheme :

1. When a workman during the course of his duty requires medical attention, and where such attention is given by the company's doctor (*i.e.*, a doctor or doctors nominated by the company including a doctor nominated as a part-time doctor) and medicines are prescribed by him, the cost of such prescription should be borne by the company ;

2. In the event of a workmen falling sick at his residence and the illness is other than a venereal disease, leprosy, smallpox, typhoid or cholera, he should be paid the cost of the medicines prescribed ;

3. Bills or cash vouchers pertaining to such prescription should be produced

for countersignature of the company's doctor before payment is authorised ;

4. Disease of a serious nature requiring hospitalisation will be subject to consideration by the company ;

5. At the time of employment the company will be entitled to get the prospective employees examined by the company's doctor and their employment will be subject to being found medically fit ;

6. All company employees who are presently employed or those employed in future will be medically examined by the company's doctor once a year or at such other periodical intervals determined by the company but the results of such medical examinations will not be prejudicial to the workmen's employment ;

7. In case a workman is found medically unfit to continue in service, the company will decide his case in consultation with the union's secretary ; and

8. This scheme will come to an end as and when the Employees' State Insurance Scheme is extended to the employees concerned.

8. The question of laying down any ceiling need not be considered as the company, we are told, is agreeable to extend this scheme in this region.

9. The third item in respect of which the company challenges the award is the revision made by the Tribunal of the existing gratuity scheme. The workmen's demand in this respect was : (1) that the maximum limit of 15 months' salary should be enhanced to 20 months' salary, and (2) that the provision in the existing scheme that no gratuity would be payable to a workman dismissed on the ground of misconduct should be substituted by a provision that even in such cases gratuity should be payable but the company would be entitled to deduct from such gratuity amount the amount of financial loss, if any, resulting from such misconduct. The Tribunal's view was that these demands were reasonable and accordingly made modifications in the existing scheme. At first, Mr. Gokhale objected to this part of the award, firstly on the ground that the Tribunal ought not to

1. C. A Nos. 856 1475 and 2119 of 1968 decided on 10th December, 1968.

have allowed gratuity even in cases of dismissal for misconduct and secondly, that the qualifying period in the case of termination of service by the company otherwise than for misconduct should be 10 years and not the graded periods from 5 to 15 years as provided in the award. On second thoughts he did not press the second objection and therefore nothing need be said about it. He, however, contended that if gratuity even in cases of dismissal for misconduct is to be made payable, a provision should be made that it would be forfeited if the misconduct is a gross one involving violence, riotous behaviour, etc. and for the rest of the cases, the qualifying period should be 15 years of continuous service.

10 These objections involve a principle and therefore, need serious consideration. The principle invoked by Mr Gokhale is firstly that since gratuity is paid as a reward for long and meritorious service it would be inconsistent with that principle to award gratuity in cases of dismissal for misconduct for such cases cannot be treated as cases of meritorious service, and secondly, the provision in such cases for deduction only of financial loss resulting from misconduct committed by the workman is neither proper nor consistent with the principle on which gratuity is made payable by an employer. A workman may be guilty of gross misconduct, such as riotous behaviour or assault on a member of the staff. Such misconduct may not result in any financial loss to the company, and therefore the workman would be paid full gratuity amount. The contention was that it would be a serious anomaly that while a workman who has caused some damage to the company's property and is dismissed on the ground that he was guilty of misconduct would have the gratuity amount payable to him reduced to the extent of that damage, another workman who for instance assaults and causes injury, even a serious injury, to another employee would though liable to be dismissed, be entitled to the full gratuity merely because the misconduct of which he is guilty, though graver in nature does not result in pecuniary loss to the company.

11 In support of his contention Mr Gokhale, learned heavily on two recent decisions of this Court in *Calcutta*

*Insurance Co., Ltd v Their Workmen*¹ and *The Delhi Cloth and General Mills Company Ltd v The Workmen*². Relying on these decisions, he urged that in cases of dismissal for misconduct, the qualifying period should not be as prescribed by the Tribunal but must be 15 years of continuous service. Mr Ramamurthi, on the other hand, contended that the principle that gratuity is a reward for long and meritorious service and that for a single misconduct after such service, such misconduct should not result in deprivation of gratuity except to the extent of the actual monetary loss caused to the employer has been long accepted in industrial adjudication and should not be abandoned and that the two decisions relied on by Mr Gokhale should not be construed as having the cumulative result of enhancing the qualifying period and also depriving gratuity in cases of dismissal for misconduct. The first decision, according to him lays down an increase in the qualifying period from 10 years, which generally used to be the period for earning gratuity to 15 years, and the second lays down certain exceptions to the accepted rule that deduction of monetary loss resulting from misconduct was sufficient. He argued that neither of the two decisions lays down that both the consequences must follow where a workman is dismissed for misconduct even if such misconduct has not resulted in any monetary loss to the employer.

12 In view of these contentions it becomes necessary for us to examine the earlier decisions cited before us before we come to the cases of *Calcutta Insurance Co. Ltd*³ and *The Delhi Cloth and General Mills Co., Ltd*².

13 The question as to whether gratuity should be payable even though the concerned workman is dismissed for misconduct appears to have been raised for the first time in *The Garment Cleaning Works v Its Workmen*⁴. The objection there raised related to clause 4 of the gratuity scheme framed by the Tribunal

¹ (1967) 2 S.C.R. 596.
² C.A. Nos. 2168, 2569 of 1966 and 76, 123 and 560 of 1967 decided on 27th September 1968.
³ (1962) 1 S.C.J. 101 (1962) 2 S.C.R. 711.
⁴ []

which provided that even if a workman was dismissed or discharged for misconduct, gratuity would still be payable except that if such a misconduct resulted in financial loss to the works, gratuity should be paid after deducting such loss. The contention urged by counsel, but which failed, was that such a clause was inconsistent with the principle on which gratuity claims were based, namely, that they were in the nature of retiral benefit based on long and meritorious service. Therefore, if a workman was guilty of misconduct and was dismissed or discharged, it would be a blot on his long and meritorious service and in such a case it would not be open to him to claim gratuity. This was a general argument and was repelled as such is clear from what the Court said at page 715 of the Report :

“ On principle, if gratuity is earned by an employee for long and meritorious service it is difficult to understand why the benefit thus earned by long and meritorious service should not be available to the employee even though at the end of such service he may have been found guilty of misconduct which entails his dismissal. Gratuity is not paid to the employee gratuitously or merely as a matter of boon. It is paid to him for the service rendered by him to the employer, and when it is once earned it is difficult to understand why it should necessarily be denied to him whatever may be the nature of misconduct for his dismissal. Therefore we do not think that it would be possible to accede to the general argument that in all cases where the service of an employee is terminated for misconduct gratuity should not be paid to him.”

The words “ why it should necessarily be denied to him whatever may be the nature of misconduct ” occurring in the earlier part of the passage and the words “ general argument that in all cases where the service of an employee is terminated for misconduct gratuity should not be paid ” and the reference by the Court to certain awards made by tribunals where simple misconduct was distinguished from grave misconduct and forfeiture of gratuity was provided for the latter occurring after this passage clearly show, firstly, that the Court was dealing with and repelled the general proposition that without any

distinction between simple and gross misconduct there should be forfeiture in all cases of dismissal for misconduct of whatsoever nature, and secondly, that though the Court approved the scheme which provided that gratuity should be paid after deducting financial loss resulting from the workman's misconduct, the Court did not lay down any principle that gratuity should be paid in cases of grave misconduct involving even violence which though it may not result in financial damage may yet be more serious than the one which results in monetary loss. The decision thus is not an authority for the proposition that even if a workman were guilty of misconduct, such as riotous behaviour or an assault on another employee, industrial adjudication should not countenance a provision for forfeiture of gratuity in such cases merely because it does not result in monetary loss or that such a provision would be inconsistent with the principle that gratuity is not a boon or a gratuitous payment but one which is earned for long and meritorious service

14. In *Motipur Zamindari Private Ltd v. Workmen*¹ the only question considered was whether the award was justified in providing forfeiture of gratuity in a case where the misconduct involved moral turpitude. The Court following *Garment Cleaning Works*², directed that instead of forfeiture, the clause should provide deduction of the amount of monetary loss, if any, caused by such misconduct. It is clear that no one canvassed the question as to whether a provision in a gratuity scheme that a workman should forfeit gratuity in the event of his committing misconduct involving violence or riotous behaviour within or around the works premises would be justified or not. Nor was it considered whether it would be anomalous to provide for exaction of compensation from gratuity amount in case of misconduct involving moral turpitude while not making any provision against misconduct, such as the use of violence or force, which though not resulting in monetary loss, yet is unquestionably of a graver nature. The case of *Employees v. Reserve Bank of India*³, was again a case where there was a general clause in the

1. (1965) 2 L L J. 139.

2. (1962) 1 S C J 108 : (1962) 2 S C R. 711.

3. (1967) 1 S C J. 338 : (1966) 1 S C R. 25 at 58,

gratuity scheme providing forfeiture in cases of dismissal for misconduct whatsoever and where in view of the decision in *Garment Cleaning Works*¹, the Bank conceded to substitute the rule by providing deduction from gratuity the amount of monetary loss occasioned by the misconduct for which dismissal is ordered. Thus, in none of the cases cited before us the question as to what should be the minimum qualifying period in cases of dismissal for misconduct and the question as to whether a provision for forfeiture of gratuity in the event of such dismissal having been ordered for misconduct involving violence were either canvassed or considered. On the other hand, in a recent decision between this very company and its workmen in Bangalore region *Remington Rand of India Ltd v Their Workmen*², the gratuity scheme made by the Tribunal provided for a qualifying period in cases of termination of service otherwise than for misconduct, but no qualifying period was provided for cases where termination of service was by way of punishment for misconduct. This Court accepted the objection of the company on the ground of this omission and laid down the qualifying period of 15 years service in such cases. In this decision the Court followed the earlier decision in *Calcutta Insurance Co*³. In another such case *Remington Rand of India v The Workmen*⁴ where the dispute concerned the workmen of the company in Kerala region 15 years service was provided as the qualifying period in cases of dismissal for misconduct.

15 In the case of *Calcutta Insurance Co*⁵, on a contention having been raised that the qualifying period for earning gratuity in cases of retirement and resignation should be 15 years' service and that no gratuity should be payable in cases of dismissal for misconduct, the Court examined the earlier decision commencing from the *Indian Oxygen and Acetylene Co Ltd*⁶, to the case of *Garment Cleaning Works*¹

and registered its demurrer against the observation made in the latter case that as gratuity was earned by an employee for long and meritorious service, it should consequently be available to him even though at the end of such service he may have been found guilty of misconduct entailing his dismissal. In so doing the Court at page 608 of the Report remarked

"In principle, it is difficult to concur in the above opinion. Gratuity cannot be put on the same level as wages. We are inclined to think that it is paid to a workman to ensure good conduct throughout the period he serves the employer. 'Long and meritorious service' must mean long and unbroken period of service meritorious to the end. As the period of service must be unbroken, so must the continuity of meritorious service be a condition for entitling the workman to gratuity. If a workman commits such misconduct as causes financial loss to his employer, the employer would under the general law have a right of action against the employee for the loss caused and making a provision for withholding payment of gratuity where such loss caused to the employer does not seem to aid to the harmonious employment of labourers or workmen. Further, the misconduct may be such as to undermine the discipline in the workers—a case in which it would be extremely difficult to assess the financial loss to the employer."

Continuity, in other words, must govern both the service and its character of meritoriousness. The Court further observed that a mere provision in a gratuity scheme enabling an employer to deduct from the gratuity amount the actual loss caused as a result of misconduct for which the workman incurs the punishment of dismissal or discharge cannot subserve industrial peace and harmony firstly, because an employer even without such a provision has under the law the right of action for claiming damages a right not taken away by industrial law, and secondly, because a misconduct resulting in dismissal may be such as may undermine discipline in the workmen in which case it would be extremely difficult to assess the financial

1 (1962) 1 S.C.J. 103, (1962) 2 S.C.R. 711

2 (1968) 1 L.L.J. 542

3 (1967) 2 S.C.R. 596

4 (1968) 1 S.C.J. 631 (1968) 1 S.C.R. 164 at

168 A.I.R. 1968 SC 224

5 (1965) 1 L.L.J. 435

loss. As regards the qualifying period, the Court laid down 10 years' service in cases of resignation or retirement and "following the principles laid down in the former decisions of this Court" provided 15 years' service for qualifying for gratuity in cases of dismissal for misconduct.

16. In the case of *Delhi Cloth and General Mills Co Ltd.*¹, an objection was raised on behalf of the workmen to clause 3 of the gratuity scheme framed by the Tribunal. That clause provided as follows :

"On termination of service on any ground whatsoever except on the ground of misconduct as in clause 1 (a) and 1 (b) above."

Clause 1 (a) and 1 (b) provided for payment of gratuity in the event of the death of an employee while in service or on his being physically and mentally incapacitated for further service and laid down the rates and the qualifying periods as follows :

(a) After 5 years continuous service and less than 10 years' service — 12 days' wages for each completed year of service.

(b) After continuous service of 10 years — 15 days' wages for each completed year of service.

The effect of clause 3, therefore, was that in case of termination of service an employee would be entitled to get gratuity at the above rates if he had put in service for the aforesaid periods, but would forfeit it if the termination was due to any misconduct committed by him. The objection was that this provision was inconsistent with the decisions so far given by this Court, that according to those decisions the only provision permissible to the Tribunal was to enable the employer to deduct actual monetary loss arising from misconduct, and that therefore, the mere fact that a workman's service was terminated for misconduct was no ground for depriving him altogether of gratuity earned by him as a result of his long and meritorious service until the date when he commits

such misconduct. In examining the validity of this contention the Court analysed the previous decisions and pointed out that none of them laid down a general principle that an industrial tribunal cannot justifiably provide that an employer need not be made to pay gratuity even where the workman had incurred termination of service on account of his having committed misconduct, not merely technical but of a grave character. The Court observed that in some decisions this Court, no doubt, had held that the fact that dismissal of a workman on account of his having committed misconduct need not entail forfeiture and that it would be sufficient to forfeit partially the gratuity payable to him to the extent of monetary loss caused to the employer. But then no decision had laid down as a principle that a provision for such forfeiture cannot be justified, however grave the misconduct may be, provided it had not caused monetary loss. The Court noticed that the trend in the earlier decisions was to deny gratuity in all cases where the workman's service was terminated for misconduct but that in later years in cases such as the *Garment Cleaning Works*¹ "a less rigid approach" was adopted. The Court then observed :

"A bare perusal of the Schedule (Model Standing Orders) shows that the expression "misconduct" covers a large area of human conduct. On the one hand are the habitual late attendance habitual negligence and neglect of work ; on the other hand are riotous or disorderly behaviour during working hours at the establishment or any act subversive of discipline, wilful in subordination or disobedience. Misconduct falling under several of these latter heads of misconduct may involve no direct loss or damage to the employer, but would render the functioning of the establishment impossible or extremely hazardous. For instance, assault on the manager of an establishment may not directly involve the employer in any loss or damage, which could be equated in terms of money, but it would render the working of the establishment impossible. One may also envisage

1. C.A. Nos. 2168, 2569 of 1966 and 76, 123 and 560 of 1967 decided on dated 27th September, 1968.

1. (1962) 1 S.C.J. 108 : (1962) 2 S.C.R. 711,

several acts of misconduct not directly involving the establishment in any loss, but which are destructive of discipline and cannot be tolerated. In none of the cases cited any detailed examination of what misconduct would or would not involve to the employer loss capable of being compensated in terms of money was made. It was broadly stated in the case which have come before this Court that notwithstanding dismissal for misconduct a workman will be entitled to gratuity after deducting the loss occasioned to the employer. If the cases cited do not enunciate any broad principle we think that in the application of those cases as precedents a distinction should be made between technical misconduct which leaves no trail of indiscipline misconduct resulting in damage to the employer's property, which may be compensated for forfeiture of gratuity or part thereof and serious misconduct which though not directly causing damage such as acts of violence against the management or other employees or riotous or disorderly behaviour, in or near the place of employment is conducive to grave indiscipline. The first should involve no forfeiture, the second may involve forfeiture of an amount equal to the loss directly suffered by the employer in consequence of the misconduct and the third may entail forfeiture of gratuity due to the workmen. The precedents of this Court, e.g., *Wanger & Co v Its Workmen*¹, *Remington Rand of India Ltd's case*², and *Motipur Zamindari (P) Ltd's case*³, do not compel us to hold that no misconduct however grave may be visited with forfeiture of gratuity. In our judgment, the rule set out by this Court in *Wanger & Co case*¹ and *Motipur Zamindari (P) Ltd's case*³ applies only to those cases where there has been by actions wilful or negligent any loss occasioned to the property of the employer and the misconduct does not involve acts of violence against the management or other employees, or riotous or disorderly behaviour in or near the place of employment. In these exceptional

cases—the third class of cases—the employer may exercise the right to forfeit gratuity to hold otherwise would be to put a premium upon conduct destructive of maintenance of discipline.

In this view, the Court modified clause 3 of the scheme by adding an explanation, the effect of which was that though the employer could not deprive the workman of the gratuity in all cases of misconduct he could do so where it consisted of acts involving violence against the management or other employees or riotous or disorderly behaviour in or near the place of employment and also gave right to the employer to deduct from gratuity such amount of loss as is occasioned by the workman's misconduct. We may mention that the Court did not alter the qualifying period in cases of misconduct since no objection appears to have been raised on that ground.

17 As against the contention¹ that a provision in accordance with these two decisions should be introduced in the scheme under examination Mr Ramamurthi² submitted that "the two decisions should not be construed as if they laid down principle which should have the cumulative effect, firstly, as to the qualifying period, and secondly, as to deprivation of gratuity in cases specified in the *Delhi Cloth and General Mills case*³. It is true that this decision does not lay down that the qualifying period in cases of misconduct should be 15 years as was held in *Calcutta Insurance Co*⁴. But, as aforesaid that was because that question was not raised while in the *Calcutta Insurance Co's Case*⁵ it was expressly raised and the Court laid down that in such cases it would be proper to provide 15 years continuous service as a criterion.

18 Once the principle¹ that gratuity is paid to ensure good conduct throughout the period that the workman serves his employer is accepted as laid down in *Calcutta Insurance Co*³, some distinction in the matter of the qualifying period between cases of resignation and retire

1 (1963) 2 L.L.J. 383

2 (1968) 1 L.L.J. 542

3 (1965) 2 L.L.J. 133

1 C.A. Nos. 2168 & 2169 of 1966 and 76/123 and 560 of 1967 decided on 27th September 1968

2 (1967) 2 S.C.R. 496

ment on the one hand and dismissal for misconduct on the other becomes logically necessary. Such a distinction cannot legitimately be assailed as unreasonable. Similarly, if the object underlying schemes of gratuity is to secure industrial harmony and satisfaction among workmen it is impossible to equate cases of death, physical incapacity, retirement and resignation with cases of termination of service incurred on account of misconduct. Besides, a longer qualifying period in the latter cases would ensure restraint against wilful use of violence and force neglect etc. No serious argument was advanced that such a distinction would not be reasonable. The objection was against the insertion of both and not against the merit of such distinction.

19. As regards the clause as to misconduct, it is not possible to disagree with the proposition laid down in the *Delhi Cloth & General Mills case*¹, that acts amounting misconduct as defined in the standing orders, where they are made, or the model standing orders, where they are applicable, differ in degree of gravity, nature and their impact on the discipline and the working of the concern, and that though grave in their nature and results, all of them may not result in loss capable of being calculated in terms of money. Amongst them there would be some which would forthwith disentitle the workman from retaining his employment and justifying his dismissal. For the reasons given in the *Delhi Cloth and General Mills case*¹, with which we, with respect, concur, we must agree with counsel for the company that it is necessary to modify the scheme and to add in clause 5 thereof a proviso that in cases where there has been termination of service on account of an employee found guilty of act or acts involving violence against the management or other employees or riotous or disorderly behaviour in or near the company's premises, the company would be entitled to forfeit the gratuity which would otherwise be payable to the concerned workman. Clause 5 should also be modified so as to introduce therein 15 years continuous service as

the qualifying period for earning gratuity in cases where the service of the employee has been terminated on account of misconduct and that such gratuity should be payable at the rate prescribed in clause 3 (d) of the scheme

20. The appeal is allowed and the award is set aside to the extent aforesaid. The gratuity scheme and the scheme for medical benefit, as revised by the Tribunal, are modified as stated above. So far as the question of bonus is concerned, that question is remanded to the Tribunal to decide it in accordance with the observations made hereinabove. The Tribunal will give liberty to the parties to adduce for that purpose such further evidence as they think necessary. There will be no order as to costs

V.M.K. ——— Ordered accordingly.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—J. C. Shah, V. Ramaswami and A. N. Grover, JJ.

Sri Rajah Velugoti Kumara Krishna Yachendra Varu and others ... Appellants* v.

Sri Rajah Velugoti Sarvagna Kumara Krishna Yachendra Varu and others ... Respondents.

(A) *Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948)*, section 66—Interpretation—“Estate”, meaning of—Buildings forming part of impartible estate, but are outside the geographical limits of an impartible estate if ceased to be part of the estate on the abolition of estates.

The word “estate” in section 66 of the *Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948)*, denotes only the estate governed by the Permanent Settlement Regulation and the Estates Land Act and not any other part of the impartible Zamindari. In other words the Abolition Act has no application to properties which are outside the territorial limits of the Venkatagiri Estate. It is true that the buildings which are outside the geographical limits of the Venkatagiri

1. C.A. Nos 2168, 2569 of 1966 and 76, 123 and 560 of 1967, decided on 27th September, 1968.

* C.A. No. 2113 of 1966.

28th October, 1969.

Zamindari cannot be brought within the definition of the estate as defined in the Estates, Lands Act and the Abolition Act cannot therefore be made applicable to such buildings. But the buildings, have acquired the character of impartibility as a result of incorporation with the parent estate and that character cannot be lost unless the statute intervenes. Section 4 of the Impartible Estates Act itself contemplates parts of an estate being impartible.

[Paras 14, 15]

(B) *Impartible Estate—Nature and incidents of—Impartible estate, if can be equated to an ancestral joint family estate.*

The law regarding the nature and incidents of impartible estate is now well settled. Impartibility is essentially a creature of custom. The junior members of a joint family in the case of impartible joint family estate take right in the property by birth and therefore have no right of partition having regard to the very nature of the estate that it is impartible. Secondly they have no right to interdict alienations by the head of the family either for necessity or otherwise. The right of junior members of the family for maintenance is governed by custom and is not based upon any joint right or interest in the property as co-owners. The income of the impartible estate is the individual income of the holder of the estate and is not the income of the joint family. To this extent the general law of Mitakshara applicable to joint family property has been modified by custom and an impartible estate though it may be an ancestral joint family estate is clothed with the incidents of self acquired and separate property to that extent. The only vestige of the incidents of joint family property [which still attaches to the joint family impartible estate] is the right of survivorship which of course is not inconsistent with the custom of impartibility. For the purposes of devolution of the property the property is assumed to be joint family property and the only right which a member of the joint family acquires by birth is to take the property by survivorship but he does not acquire any interest in the property itself. The right to take by sur-

vivorship continues only so long as the joint family does not cease to exist and only manner by which this right of survivorship could be put an end to is by establishing that the estate ceased to be joint family property for the purpose of succession by proving an intention, express or implied, on behalf of the junior members of the family to renounce or surrender the right to succeed to the estate. [Para 17]

(C) *Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), sections 45, 46 and 47—Scope—Right of the junior members of the joint family to receive maintenance from the entire income of the impartible estate prior to the notified date—Right based on contract or family arrangement—Right if extinguished by the operation of sections 45 to 47.*

On the question whether sections 45 to 47 of the Abolition Act have the effect of extinguishing any rights which the junior members of the Zamindari family may have had before the notified date to receive maintenance out of the entire income of the Zamindari under the contract or family arrangement.

Held: Section 5 4 (2) of the Abolition Act provides for the ascertainment of the amount of maintenance payable to persons who before the notified date, were entitled to maintenance out of the estate and its income either under section 9 or section 12 of the Madras Impartible Estates Act or under any contract or family arrangement. Section 45 of the Abolition Act is concerned only with the apportionment of compensation amount. This section is concerned with the rights and liabilities in relation to properties which are represented by the compensation. There may be a case of an impartible Zamindari where the properties not transferred under section 3 (b) are quite as valuable as the properties transferred. If in such a case, there is a contract or family arrangement for the payment of maintenance such a contract or family arrangement would as regards the quantum of the allowance have some relation to the total income of the properties of the Zamindari. In the absence of express words to that effect, it would not be right to attribute to the Legislature an intention to free

the properties not transferred to the Government by the operation of section 3 (b) of the Act from liability to contribute towards the maintenance of the junior members under such a contract of family arrangement, and, while leaving the landholder in possession of those properties, limit the maintenance holders to a share of a fifth of the compensation amount. Therefore, it has to be held that sections 45 to 47 of the Abolition Act do not have the effect of extinguishing any rights which the junior members of the Zamindari family may have had before the notified date to receive maintenance out of the entire income of the Zamindari under the contract or family arrangement.

Appeal from the Judgment and Decree dated the 13th August, 1965 of the Madras High Court in O. S. A Nos. 40 and 53 of 1961.

C. R. Pattabhiraman, Senior Advocate (*V. Suresham* and *Balakrishnan*, Advocates with him), for Appellants.

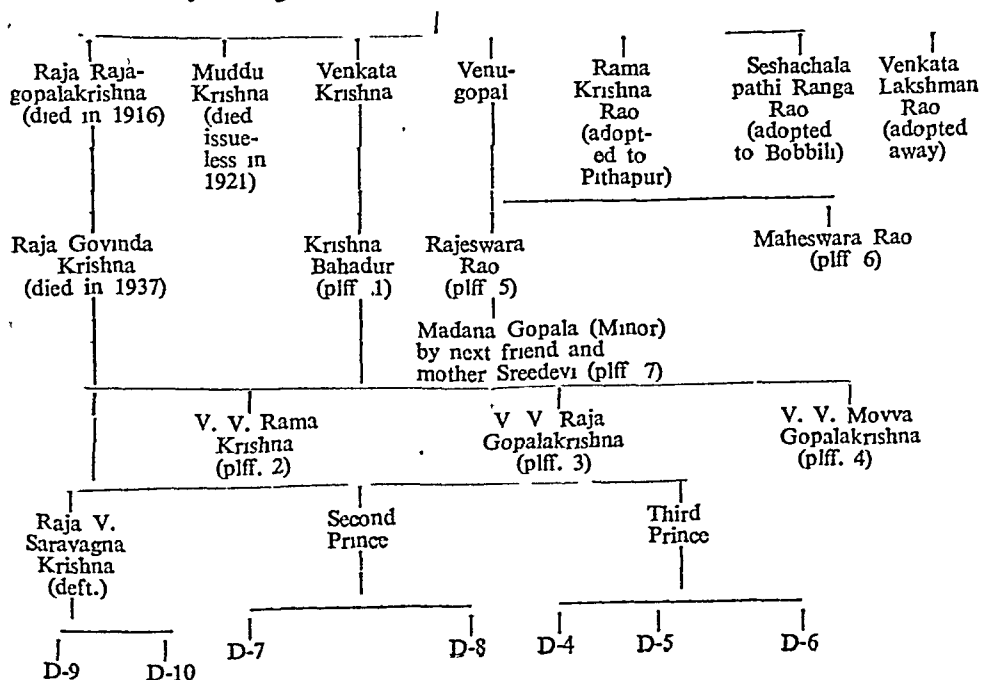
V. Vedantachari and *K. Jayaram*, Advocates, for Respondent No. 1.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal arises out of a suit O.S. No.351 of 1952 filed for partition

by 7 plaintiffs, viz., (1) Sri Raja Venkata Kumara Krishna Yachendra, (2) Sri Rajah V. V. Ramakrishna, (3) Sri Raja V. V. Rajagopala Krishna, (4) Sri Raja V. V. Muvva Gopala Krishna, (5) Sri Raja V. Rajeswara Rao, (6) Sri Rajah V. Maheswara Rao and (7) Sri Raja V. Mamana Gopala Krishna, minor by next friend and mother Smt. Sr.devamma in respect of the Venkatagiri Estate and other properties as accretions to this estate. The first defendant in the suit was the holder of the zamindari until it was notified and taken over by the State on 7th September, 1949. The 3rd and 4th (2nd and 3rd?) defendants are brothers of the first defendant. The third (*sic*) defendant died during the pendency of the suit and defendants 7 and 8 are his sons. Defendants 4, 5 and 6 are the sons of the 4th (3rd) defendant. The 9th and 10th defendants are the sons of the 1st defendant. The fourth plaintiff Sri Raja V. V. Muvva Gopala Krishna died during the pendency of the appeals against the suit in the High Court of Madras. After the filing of the petition of appeal in this Court Sri Raja V. Maheswara Rao, the 6th plaintiff also died. The relationship of the parties will appear from the following pedigree :

Sri Rajah Velugoti Kumara Yachendra Nayudu Bahadur



2 The Venkatagiri Estate is an ancient impartible estate in Nellore District included in the Schedule under the Madras Impartible Estates Act (II of 1904). In the year 1878 Raja Velugoti Kumara Yachema, who heads the above pedigree, was the Zamindar. He had seven sons of whom three had been given away in adoption. The eldest of the sons was Rajagopala Krishna to whom Raja Velugoti Kumara Yachema handed over the entire estate and certain other properties with a view to spend the rest of his life in pety and meditation. In 1889 Muddu Krishna and Venkata Krishna, two of the sons, claimed a share in the estate contending that the estate was partible and the four sons were each entitled to a fourth share in the family properties. Rajagopala Krishna, however, asserted its impartible character. Ultimately there was a settlement between the parties wherein Muddu Krishna and Venkata Krishna withdrew their claim to partition and recognised the impartible character of the Zamindari. The settlement involved the payment of large sums of money by Rajagopala Krishna to his three younger brothers Muddu Krishna, Venkata Krishna and Venugopal. Venugopal was then a minor and was represented by the father Raja Velugoti Kumara Yachema himself. The terms of the settlement were embodied in a stamped document bearing the date 8th April 1889. Its terms may be summarised as follows: (a) recognition by all the brothers that the Venkatagiri estate was impartible with descent along the eldest line that is by Rajagopala Krishna the then Zamindar and after him by his son, son's son and so on the eldest male line; (b) the three brothers of the then Rajah, Muddu Krishna, Venkata Krishna and Venugopal should each receive a sum of Rs 5,81,252 11 10; (c) Muddu Krishna, Venkata Krishna and Venugopal should also receive a sum of Rs 40,000 each for providing themselves with residence; (d) a provision for the marriage expenses of Venkata Krishna and Venugopal; and (e) provision that Rajagopala Krishna and his successors to the estate should pay to Muddu Krishna, Venkata Krishna and Venugopal a sum of Rs 1,000 each per mensem for life and on their death a similar amount to the male descendants (*Purusha santhathi*) by way of allowance, the

amount payable to each branch being Rs 1,000 irrespective of the number of descendants.

3 Venugopal, the last of the four brothers never married and plaintiffs 5 and 6 to the suit are his illegitimate sons. In 1932 plaintiffs 5 and 6 instituted a suit against the Estate (O S No 30 of 1932) claiming maintenance allowance and relying upon the agreement of 1889 and in the alternative on custom and Hindu law. The Subordinate Judge found that custom was not proved and that they were not entitled to maintenance under the Hindu law. But he found that the claimants were entitled to the maintenance under the deed as *Purusha santhathi*. On appeal the High Court agreed with the finding of the trial Court as regards the absence of any custom but differed from the interpretation of *Purusha santhathi* and held that the term was applicable only to legitimate sons and not to illegitimate sons. The High Court however, took the view that the plaintiffs 5 and 6 were entitled to maintenance under the Hindu Law. The judgment of the High Court is reported in *Maharaja of Venkatagiri v Raja Rajeswara Rao*¹. The matter was taken in appeal to the Judicial Committee and the Judicial Committee allowed the appeal of the Rajah holding that the illegitimate sons of Venugopal were not entitled to maintenance either under the agreement of 1889 or under the Hindu Law. The decision of the Judicial Committee is reported in *Raja Krishna Yachendra v Raja Rajeswara Rao*².

4 At the time of the notification of the estate under the Madras Estates (Abolition and Conversion into Ryotwari) Act 1948 (XXXVI of 1948) (here after called the Abolition Act) the first defendant in the suit held the estate and was the principal landholder under the Act. Under section 66 of the Abolition Act on and from the notified date the Madras Impartible Estates Act 1904 (II of 1904) shall be deemed to have been repealed in its application to the Estate.

¹ (1939) 1 M.L.J. 831 1 L.R. (1939) Mad 622.

² 1 L.R. (1942) Mad 419 1 L.R. 68 L.A. 181 (1942) 1 M.L.J. 132.

Out of the advance compensation first deposited, plaintiffs 1 to 4 had been paid a sum of Rs. 75,000 as maintenance holders under section 45 of the Abolition Act. They were entitled under the Act to a further sum of Rs. 75,000 in the second instalment of compensation and a share in such additional compensation that may be given. They were also given interim payments at Rs. 9,000 per year under section 50 of the Abolition Act. Under section 47 of the Act they were also entitled to ryotwari patta.

5. The case of the plaintiff was that the Venkatagiri Estate became an impartible estate only under the agreement of 1889 between the parties and became a statutory impartible estate by virtue of its inclusion in the Schedule to the Madras Impartible Estates Act, 1904 and that on the repeal of that enactment by section 66 of the Abolition Act the Estate became partible. The contention of the plaintiffs was that as junior members of a joint family they were entitled to a share in the compensation amount and also to a share in Schedule B properties which were not vested in the State Government. So far as the claim to a share in the compensation amount is concerned, there were proceedings under the Abolition Act itself. The suit was principally confined to the claim for a share in the B Schedule properties and for an alternative claim for maintenance at Rs. 1,000 per mensem. So far as the B schedule properties are concerned, the claim was confined to shares in three items of immovable properties, namely (1) Motimahal, No. 187, Mount Road, Madras, (2) Venkatagiri Rajah's Bungalow at Nellore and (3) Venkatagiri Rajah's bungalow at Kalahasti. Out of the movable properties the claim was confined to sub-item (8) of item 8 of the B Schedule, that is, a golden howdah. It is the case of the plaintiffs that the repeal of the Impartible Estates Act by virtue of the notification will have the effect of changing the character of the properties in the B Schedule and making them partible. It was contended that even if for any reason the plaintiffs are not granted a share in the properties of the estate, they must be paid a sum of Rs. 1,000 per mensem in terms of the original agreement of 8th April, 1889.

6. The trial Judge, Subramaniam, J., held that the Venkatagiri Zamindari was impartible by custom even apart from the agreement of 1889 and the Impartible Estates Act of 1902 and 1904. Even after the abolition of the Venkatagiri Estate the character of impartibility was found to continue in respect of B Schedule properties which formed part of the Zamindari. The learned Judge held that the plaintiffs 1 to 4 were not entitled to a share in the immovable properties of B schedule but were entitled to recover such sum as may be needed to make up the monthly allowance for their branch at Rs. 1,000 per mensem after taking into consideration the amount which plaintiffs 1 to 4 were given under the Abolition Act. They were granted a charge for the amount on items 1, 14 and 16 of plaintiff B Schedule. Plaintiffs 1 to 4 were also given a decree for one-third share sub-item (8) of item 8 of Schedule B properties, namely, the golden howdah. So far as plaintiffs 5 to 7 were concerned they were held not entitled to any relief. The plaintiffs 1 to 7 preferred appeal O. S. A. No. 53 of 1961 against the judgment of the trial Judge in O. S. No. 351 of 1952. The first defendant also filed O. S. A. No. 40/61 against that portion of the judgment in O. S. No. 351 of 1952 whereby the trial judge held that even after the notification of the Venkatagiri Estate under the Abolition Act and the payment of the compensation under that Act to plaintiffs 1 to 4 their claim for maintenance under the agreement of 8th April, 1889 continued in force and that plaintiffs 1 to 4 were entitled to a payment of Rs. 1,000 per mensem each after giving credit for payments made under the Abolition Act. Both the appeals O. S. A. No. 53 of 1961 and O. S. A. No. 40 of 1961 were heard together and disposed of by a Division Bench consisting of Chandra Reddy, C. J. and Natesan, J., by a common judgment dated 13th August, 1965. The Division Bench held that plaintiff 1 to 4 having enjoyed the benefit of payment under section 45 (5) of the Abolition Act and got capitalised by the Tribunal of their maintenance rights on the basis of the extinction of the Estate cannot make a further claim as if the agreement of 1889 was a subsisting one and call upon the 1st defendant to make up for any deficiency from the properties that had not vested in the Government. The Division

Bench also disallowed the claim of plaintiffs 1 to 4 for a share in the value of the golden howdahs. It was pointed out that silver and the golden howdah were not treated as impartible but were actually divided among the family members. Accordingly the Division Bench allowed the appeal O S A No 40 of 1961 filed by the 1st defendant. In regard to O S A No 53 of 1961 the Division Bench held the claim that the Venkatagiri Estate was not an impartible estate by custom was devoid of merit. It was pointed out that before the Special Tribunal under the Abolition Act the plaintiffs had advanced the same contention but it was rejected. Plaintiffs 1 to 4 filed an appeal to the Court against the decision of the Special Tribunal. The decision of this Court is reported in *Raja Muvva Gopalakrishna Yachendra and others v Raja V V Sarvagna Krishna Yachendra and others*¹. Before this Court plaintiffs 1 to 4 did not question the finding of the Special Tribunal that Venkatagiri Estate was an impartible estate. On the other hand the contention advanced by the plaintiffs was that the Venkatagiri Estate was impartible by custom and that the impartibility continued under the Madras Impartible Estates Act but ceased when the estate vested in the State Government. The Division Bench upon an examination of the evidence held that Venkatagiri Estate was an impartible estate by custom and was not made impartible for the first time under the agreement of 1889 or by Acts of 1902 or 1904. The claim for partition made by plaintiffs in respect of the B Schedule immovable properties was negatived. As regards the claim to maintenance made by plaintiffs 5 to 7 the Division Bench held that a similar claim had been rejected previously by the Judicial Committee as not tenable either under the Agreement of 1889 or under Hindu Law or on the basis of custom. In the result O S A No 53 of 1961 filed by the plaintiffs was dismissed. O S A No 40 of 1961 preferred by the 1st defendant was allowed and the suit was dismissed in its entirety.

7 The first question to be considered in this appeal is whether the plaintiffs are entitled to claim a share in the three items of immovable properties of B Schedule already referred to. The argument on their behalf may be summarised as follows. Venkatagiri Estate admittedly an ancestral estate was not impartible by custom but for the first time by the agreement of 1889 the parties thereto agreed to hold it as an impartible estate, succession being governed by the law of primogeniture. The arrangement was brought about to preserve the integrity of the Estate and to preserve its past glory. By reason of the notification of the Estate under the Abolition Act and the vesting of the Estate in the Government the purpose for which the agreement was entered into was frustrated. The agreement of 1889 could therefore be no longer relied upon for preserving the impartible character of the Estate or what was left of it. The three items of immovable properties though outside the territorial limits of the Zamindari were held impartible only as appurtenant to the main Estate and after the impartible character of the main estate was lost, these properties became partible. Even though the estate was treated as an impartible estate, it was an ancestral estate as there was joint ownership of the Estate in the family members. Plaintiffs 1 to 4, therefore were entitled to one third share of the properties of B Schedule which are not vested in the Government and plaintiffs 5 to 7 were entitled similarly to another one third share.

8 In our opinion the contention of the plaintiffs that Venkatagiri Estate was not impartible by custom is untenable. The early history of the Zamindari is summarised in *Gopalakrishna v Sarvagna Krishna*² as follows:

'The estate of Venkatagiri has been in existence since Muhammadan times. On the disruption of the Moghal Empire it owed allegiance to the Nawabs of Arcot. In addition to the payment of peshkush they had to maintain an armed force for the assistance of Government in times of disorder or rebellion. As a result of the treaty

1. (1964) 1 M L J (S C) 106. (1964) 1 An W R (S C) 106. (1964) 1 S C J 342. (1963) 2 S C R. (Supp.) 280.

2. (1955) An W R 590.

between the East India Company on the one side and the Nawab of Arcot on the other the administration of that part of the country under the suzerainty of the latter was made over to the British. Under this treaty the Zamindari of Venkatagiri was recognised and the Rajah had to pay to the East India Company what he was paying before to the Muhammadan rulers. Sometime later, in accordance with the arrangement entered into between the Zamindars in Western Arcot and Lord Clive, the East India Company took over the responsibility for the preservation of law and order and the Zamindars were relieved of the task of maintaining armed forces and in its stead they undertook to pay an additional revenue on their estate, which was added to the peshkush. It was assured that the fixed peshkush would remain unalterable. In pursuance of this agreement, a sanad was granted in 1802 to the Zamindar of Venkatagiri and other Zamindars embodying the terms agreed upon. Ever since, successive Zamindars held the estate paying peshkush which has been invariable."

The Estate is described in the official documents in the year 1801 as one of the the Western palayams. It was observed by the Privy Council in *Naraguntty Lutchmeedavamah v. Vengama Naidoo*¹.

"A polliam is explained in Wilson's Glossary to be 'a tract of country subject to a petty Chieftain.' In speaking of Polligars, he describes them as having been originally petty Chieftains occupying usually tracts of hill or forest, subject to pay tribute and service to the paramount State, but seldom paying either, and more or less independent; but as having at present, since the subjugation of the country by the East India Company, subsided into peaceable landholders. This corresponds with the account read at the Bar from the Report of the Select Committee on the affairs of India, in 1812. A Polliam is in the nature of a Raj; it may belong to an undivided family, but it is not the subject of partition; it can be held by only one member of the family at a time, who is styled the

Polligar, the other members of the family being entitled to a maintenance or allowance out of the estate."

9. The document of 1889 also negatives the case of the plaintiffs that the Estate was made impartible for the first time by that document. The language of the document clearly shows that it only recognised the then subsisting impartible character of the Estate. In other words the document proceeds on the assumption that the Zamindari was made impartible by custom from the very beginning. The relevant portion of the agreement of 1889 Exhibit A-1 is to the following effect:

"On the 18th April, 1889, the Contract entered in writing by Raja Velugoti Rajagopala Krishna Yachendra Bahadur, Rajah of Venkatagiri, eldest son of Sri Raja Velugoti Kumara Yachama Naidu and his three uterine brothers: (1) Muddu Krishna, (2) Venkatakrishna and (3) minor Venugopala by his father and guardian Raja Velugoti Kumara Yachama Naidu is as follows: Out of the sons of the said Sri Raja Velugoti Kumara Yachama Naidu, excluding the three .. who, have been given in adoption: while we remaining four brothers comprising the parties to this document are sons of the said Raja V. Kumara Yachama Naidu and members of an undivided family; because the Venkatagiri Estate is impartible and subject to the law of primogeniture our father Sri Raja V. Kumara Yachama Naidu, with the intention of his seeing, and approving of, the ruling of the estate by his eldest son the Raja Rajagopala Krishna, and with the intention of passing his time thereafter in future in the meditation of God, as means to attain to the world beyond, transferred on the 28th October, 1878 to the eldest of us four and the heir apparent to the estate, namely, the Raja Rajagopala Krishna, Raja of Venkatagiri, the Venkatagiri Zamindar, the immovable properties relating thereto, the other immovable properties which were acquired by means of the income of the said Zamindar and all his ancestral and his self-acquired movable properties, excepting the nine lakhs and odd rupees and all the properties connected therewith including its accretions which he retained for his charitable expenses. Since, then, the aforesaid Raja Raja-

1. (1861-63) 9 M.I.A. 66.

gopala Krishna Yachandria Raja of Venkatagiri, has been ruling the estate

When the matters stood thus, on account of ill feeling that arose between some of us two of us namely Muddukrishna Yachendru and Venkata Krishna Yachendru, expressed the desire that the said Venkatagiri Zamindari, the immovable properties connected therewith, the other immovable properties acquired by means of the income of the said Venkatagiri Zamindari and all the movable properties should be divided into four shares and their respective shares should be given to them. The Raja Rajagopala Krishna Raja of Venkatagiri becoming aware of this fact, contended that the Venkatagiri Zamindari, the other immovable properties connected therewith, the other immovable properties which were acquired by his father out of the income of that Zamindari and transferred by him to him along with the estate and ancestral and self acquired movable properties of his father which the latter transferred to him along with the estate were impartible. Thereupon all of us brothers consulted about the aforementioned points of dispute our father who is all knowing and who has considerable experience. *He considered it well and positively expressed his opinion that regard to immovable property the Venkatagiri Zamindari was originally earned by our ancestors by reason of valour in war, that it was an ancient Zamindari that it was an impartible estate devolving along the eldest line of descendants, that it was permanently settled, that, when Sannad Milkiyat Isti mirar was granted to the ancestors, who was then the Zamindar of Venkatagiri, the peshkush for this Venkatagiri Estate was fixed with reference to the amount of expenses of the military troops and servants which he (our ancestor) was supplying and with reference to the money paid as tribute to the former Government namely, Nawab that therefore this Venkatagiri estate was not partible that the immovable properties connected therewith and other immovable properties acquired by means of the income of the said estate were also of course impartible—that in regard to movable property, his ances-*

tral and self acquired money in cash, the money consisting of deposits kept in the firms of Arbuthnot & Company, and Binny & Company, all the silver, gold and precious stones jewels, which were on the 26th October, 1878 transferred along with the said Venkatagiri Estate to this eldest son the Raja Rajagopala Krishna Raja of Venkatagiri, together with the accretions thereto upto now should be divided equally among his four sons who are among the parties to this document—that such would be a just arrangement. In regard to our father's opinion about the immovable property, the three youngest of us brothers consulted their proper friends and in regard to our father's opinion about the aforementioned movable properties which were acquired by Raja Velugoti Kumara Yachama and transferred along with the Venkatagiri Estate the eldest of these four brothers consulted his proper friends. On account of the cogent reasons urged by the respective friends of these both parties, and for the reasons urged by the respective friends of these both parties and for the reason that all family feuds would (thereby) end and compromised the opinions of one of the parties to this document, namely, Raja Velugoti Kumara Yachama Naidu on the two points referred to above have been agreed in as certainly correct and accepted by the remaining parties, namely, we four brothers. Therefore the parties to this document, namely, we four brothers and our father Raja Velugoti Kumara Yachama do now jointly and severally hereby determine agree and affirm as follows

' All this Venkatagiri Estate is impartible descendible along the eldest line (of descent) of the said Estate, the immovable properties connected therewith and the other immovable properties acquired by means of the income of the said estate should be enjoyed by the eldest of us four brothers and the heir of the aforesaid Raja Velugoti Kumara Yachama namely the aforesaid Velugoti Rajagopala Krishna and after him by his son son's son and so on in the eldest male line of descent subject to the condition of paying allowances to other members of our family suitably to their respective status out of

the income from the estate and the properties. And so we divide in the manner shown below all the money, silver, gold and precious stones, jewels, and the accretions resulting thereto upto this day which formed ancestral and self-acquisition of our father along with the said estate”

10. Counsel for the plaintiffs has been unable to show any term in this Agreement to support his contention that it was only by virtue of that document that the parties agreed to call the Estate impartible. On the contrary the document indicates that there was clear recognition by the executants of the then character of the Estate as an impartible zamindari.

11. We shall then deal with the inclusion of the Venkatagiri Zamindari in the Impartible Estates Act passed by the Madras Legislature in 1902 and 1904. These Acts became necessary as a result of the ruling of the Privy Council in *Sri Raja Rao Venkata Mahipati Rama Krishna Rao Bahadur v. The Court of Wards*¹. The decision of the Judicial Committee was given in 1889 and the Impartible Estates Act was passed in Madras in 1902 with a view to preserve the ancient zamindaris of the Madras Presidency. Referring to the Schedule to the Act the statement of objects and reasons explained that the schedule contained only Permanent Settlement Estates in existence before the date of Permanent Settlement Regulations and which have been declared by the judicial decisions to be impartible or locally considered by ancient custom to be so impartible and had in fact descended without partition since that date. The Impartible Estates Act, 1904 finally took the place of 1902 Act. The Estate of Venkatagiri has been included in the schedule annexed to both the Impartible Estates Acts. The obvious inference is that the Government had made enquiries and were satisfied that the Estates included in the schedule to Act II of 1904 were impartible and the inclusion of the Estates therein is a legislative determination that they were impartible. In *Pushavathi Viziamam Gajapathi Raj Manne v. Pushavathi Viswaswar Gajapathi Raj*² this Court observed :

1. (1899) I L R. 22 Mad. 383 · L R 26 I.A. 83; 9 M.L.J. (Supp.) 1 · 1 Bom L R 277.
2. (1964) 2 S.C.R. 403.

“ Soon after these decisions were pronounced by the Privy Council, the Madras Legislature stepped in because those decisions very rudely disturbed the view held in Madras about the limitations on the powers of holders of impartible estates in the matter of making alienations of the said estates. That led to the passing of the Madras Impartible Estates Acts II of 1902, II of 1903 and II of 1904. The Legislature took the precaution of making necessary enquiries in regard to impartible estates within the State and made what the Legislature thought were necessary provisions in respect of the terms and conditions on which the said estates were held.”

12. In these circumstances we see no reason to differ from the finding of the High Court that the Estate of Venkatagiri was an ancient impartible Estate by custom and was not made impartible for the first time under the agreement of 1889 or by the Madras Acts of 1902 and 1904.

13. The next question for determination is what is the effect of the Abolition Act on the rights and obligations of the members of the family in relation to the Venkatagiri Zamindari. According to the plaintiffs the property described in the B Schedule appended to the plaint did not vest under section 3 (b) of the Abolition Act. The properties in the B Schedule include a building in Mount Road, Madras a bungalow at Kalahasti and the District Judge's bungalow at Nellore Town. These buildings are situated outside the territorial limits of the Venkatagiri Estate. Section 3 (a) and (b) of the Abolition Act states :

* * * *

“ 3. With effect on and from the notified date and save as otherwise expressly provided in this Act—

1. (a) (the Madras Estates) Land (Reduction of Rent) Act, 1947 (Madras Act XXX of 1947) (in so far as it relates) to matters other than the reduction of rents and the collection of arrears of rent and the Madras Permanent Settlement Regulation, 1802 (Madras Regulation XXV of 1802), the Madras Estates Land Act, 1908 (Madras Act I of 1908), and all other enactments applicable to the estate as such shall be deemed to have been repealed in their application to the estate.

(b) the entire estate (including all communal lands, porambokes, other non-ryot lands, waste lands, pasture lands, lanka lands, forests, mines and minerals, quarries, rivers and streams, tanks and irrigation works, fisheries and ferries), shall stand transferred to the Government and vest in them free of all encumbrances and the Madras Revenue Recovery Act, 1964 the Madras Irrigation Cess Act, 1865, and all other enactments applicable to ryotwari areas shall apply to the estate,

* * * *

Section 1 (3) states

* * * *

(3) It applies to all estates as defined in section 3, clause (2) of the Madras Estates Land Act, 1908, except inam villages which became estates by virtue of the Madras Estates Land (Third Amendment) Act 1936

Section 2 (3) defines 'estate' to mean

* * * *

(3) "estate" means a zamindari or an under tenure or an inam estate,

* * * *

Section 2 (16) defines "Zamindari" as follows

* * * *

(16) "Zamindari estate" means—

(i) an estate within the meaning of section 3 clause (2) (a), of the Estates Land Act, after excluding therefrom every portion which is itself an estate under section 3 clause (2) (b) or (2) (e), of that Act, or

(ii) an estate within the meaning of section 3, clause (2) (b) or (2) (e), of the Estates Land Act, after excluding therefrom every portion which is itself an estate under section 3, clause (2) (e), of that Act

* * * *

Section 3 (2) of Estates Land Act (Madras Act I of 1908) defined an 'estate' to mean

(a) any permanently settled estate or temporarily settled zamindari,

(b) any portion of such permanently settled estate or temporarily settled

zamindari which is separately registered in the office of the Collector,

(c) any unsettled palaiyam or jagir,

* * * *

14 Section 2 (2) of the Madras Impartible Estates Act, 1904 (Madras Act II of 1904) defines an "impartible estate" as 'an estate descendible to a single heir and subject to the other incidents of impartible estates in Southern India'. In relation to the Venkatagiri Zamindari the expression Estate in section 3 (a) of the Abolition Act refers obviously to the Venkatagiri Estate which till then was subject to the operation of the Madras Permanent Settlement Regulation and the Madras Estates Land Act. In relation to the Venkatagiri Zamindari section 66 of the Abolition Act enacts that with effect from the notified date the Madras Impartible Estates Act, 1904 shall be deemed to have been repealed in its application to the Estate. The question arises whether the word "estate" in section 66 of the Abolition Act denotes the zamindari consisting of properties which stood transferred to the Government under the Abolition Act and properties which are not so transferred, or whether the expression 'estate' refers to only the Venkatagiri Estate which until the notification issued under the Abolition Act took effect was the subject of the Permanent Settlement Regulation and the Madras Estates Land Act. The High Court has given sufficient reasons in support of its view that the word 'estate' in section 66 of the Abolition Act denotes only the estate governed by the Permanent Settlement Regulation and the Estates Land Act and not any other part of the impartible zamindari. In other words the Abolition Act has no application to properties which are outside the territorial limits of the Venkatagiri Estate. The result, therefore, is that in relation to Venkatagiri Zamindari the Madras Impartible Estates Act has been repealed so far as the Act applied to the Estate which by operation of section 3 (b) of the Abolition Act has got transferred and became vested in the State Government. In relation to other properties which have not become so vested in the Government the Madras Impartible Estates Act (1904) continues to be in force. It is the case of the plaintiffs that items 14, 15 and 16 of Schedule B did not vest in the Govern

ment under section 3 (b) of the Act. Items 14, 15 and 16 are Motimahal, Mount Road, Madras, the District Judge's bungalow, Nellore and Venkatagiri Raja's bungalow, Kalahasti. It is conceded on behalf of defendant No. 1 that items 14, 15 and 16 did not vest in the Government under section 3 (b) of the Abolition Act. It is further claimed on behalf of the plaintiffs that items 14, 15 and 16 have become partible properties after the coming into force of the Abolition Act and plaintiffs should be granted their shares of these properties. The contention of the plaintiffs is that the Zamindari was made impartible by the agreement entered into by the brothers in 1889 and the properties which have not been taken over by the Government should be divided among the family members. We have already given reasons for the view that the Zamindari was impartible independently of the agreement of 1889 and that the agreement was no more than a conscious affirmation by the parties of what the position was previously in fact and in law. To put it differently the agreement of 1889 merely acknowledged and defined antecedent rights and antecedent obligations. It is therefore difficult to accept the contention of the plaintiffs that the three items of property in Schedule B have become partible properties. Since the Abolition Act did not affect these items the properties have continued to be what they were at the time of incorporation with the zamindari, namely the properties retain their impartible character.

15. We are also not impressed with the argument that as there was incorporation of the buildings with the original impartible estate the buildings ceased to have any impartible character when the impartibility of the parent estate was gone. It is true that the buildings which are outside the geographical limits of the Venkatagiri Zamindari cannot be brought within the definition of the Estate as defined in the Estates Lands Act and the Abolition Act cannot therefore be made applicable to such buildings. But the buildings have acquired the character of impartibility as a result of incorporation with the parent estate and that character cannot be lost unless the statute intervenes. Section 4 of the Impartible Estates Act itself contemplates parts of an Estate being impartible. In *Pushavathi Viziarām Gajapathi Raj Manne v. Pushavathi Visweswar Gajapathi Raj*¹ the effect of integration is described as follows :

"In all such cases, the crucial test is one of intention. It would be noticed that the effect of incorporation in such cases is the reverse of the effect of blending self-acquired property with the joint family property. In the latter category of cases where a person acquires separate property and blends it with the property of the joint family of which he is a coparcener, the separate property loses its character as a separate acquisition and merges in the joint family property, with the result that devolution in respect of that property is then governed by survivorship and not by succession. On the other hand, if the holder of an impartible estate acquires property and incorporates it with the impartible estate he makes it a part of the impartible estate with the result that the acquisition ceases to be partible and becomes impartible. In both cases, however, the essential test is one of intention and so, wherever intention is proved, either by conduct or otherwise, an inference as to blending or incorporation would be drawn."

16. It was urged on behalf of the plaintiffs that the effect of the Abolition Act in regard to Venkatagiri Estate was to take away the character of impartibility in relation to property both inside and outside the territorial limits of the estate. It was also contended that the object of the Abolition Act was three-fold : (1) to eliminate the class of middlemen, (2) to abolish Permanent Settlement and (3) to introduce ryotwari system. The argument was that in the face of the avowed objects of the legislation it was futile to contend that the character of impartibility still continued in a truncated form. It was said *cessante ratione legis, cassat et ipsa lex* (reason is the soul of the law and when the reason for any particular law ceases, so does the law itself). It is not possible to accept this principle in the present case. For, many times custom outlives the condition of things which give it birth. As observed by Lord Atkinson in *Rai Kishore Singh v. Mst. Gahenabai*² :

1. (1964) 2 S.C.R. 403.
2. (1919) 37 M.L.J. 562 : 53 I.C. 630 · A.I.R. 1919 P.C. 100.

'It is difficult to see why a family should not similarly agree expressly or impliedly to continue to observe a custom necessitated by the condition of things existing in primitive times after that condition had completely altered. Therefore the principle embodied in the expression *cessat ratio cessat lex*' does not apply where the custom outlives the condition of things which gave it birth'

We accordingly reject the contention of the plaintiff on this aspect of the case

17 We are also unable to accept the contention of the plaintiffs that the property of the impartible estate was held in coparcenary as joint family property and became partible amongst the members once it lost its character of impartibility. In other words the contention was that junior members had a present interest in the impartible estate and were entitled to a share in the estate once impartibility was removed. In our opinion there is no justification for this argument. The law regarding the nature and incidents of impartible estate is now well-settled. Impartibility is essentially a creature of custom. The junior members of a joint family in the case of ancient impartible joint family estate take no right in the property by birth and, therefore, have no right of partition having regard to the very nature of the estate that it is impartible. Secondly, they have no right to interdict alienations by the head of the family either for necessity or otherwise. This of course is subject to section 4 of the Madras Impartible Estates Act in the case of impartible estates governed by the Act. The right of junior members of the family for maintenance is governed by custom and is not based upon any joint right or interest in the property as co-owners. This is now made clear by the judicial committee in *Commissioner of Income tax, Punjab v Dewan Krishna Kishore*¹ and *Raja Valugoti Sarvagna Kumara Krishna Yachendra Bahadur Varu v Raja Rajeswara Rao*². The income of the impartible estate is the individual income of the holder of the estate and is not the income of

the joint family. In the former case Sir George Rankin observed

'But they find it necessary to say that the law as declared in the cases of *Balnath*¹ and *Shiba Prasad Singh*², has not been unsettled by the *Gorakhpur case*³. The observation itself and its context show that the reference to other judgments of the Board is controlled by the reference to *Balnath's case*¹, as having negatived the view that an impartible estate could not be in any sense joint family property. The issue in the *Gorakhpur case*³, was Indarjit's right to succeed, and the passage cited was addressed to that. It appears to waive aside, as no longer an obstacle, the extreme logic that as there is no right to a partition the junior branch could have no right, actual or prospective which the enjoyment of maintenance could evidence. It need not be taken as swinging to the opposite extreme indeed it would be in a high degree unreasonable having regard to the line of decisions to interpret it as meaning that there is no reason why holders of impartible estates should not now be told that, unless they can prove a custom to the contrary, all junior male members of the family have a claim for maintenance—that is all who have not relinquished their right of succession. The point made is only this that rights of maintenance out of an impartible family estate—however little they may be, and to whichever member they be extended—would not be enjoyed or enjoyable by anyone who had ceased to be joint in respect of the estate. In their Lordships' opinion this should not be taken to affirm any disputable doctrine as to the origin of the right of maintenance or any other doctrine which would make junior members "actual co-owners" or the right a "real right" in the sense negatived by the Board in *Balnath's case*¹."

To this extent the general law of Mitakshara, applicable to joint family property has been modified by custom and an impartible estate though it may be an ancestral joint family estate, is clothed with the incidents

¹ (1941) 2 M.L.J. 972 (1941) 68 I.A. 155 at 177, 178.

² (1941) 68 I.A. 181 (1942) Mad. 419 (1942) 1 M.L.J. 132.

¹ (1921) L.R. 48 I.A. 195 40 M.L.J. 387

² (1932) L.R. 55 I.A. 331 63 M.L.J. 196

³ (1934) 67 M.L.J. 274 L.R. 61 I.A. 286.

of self-acquired and separate property to that extent. The only vestige of the incidents of joint family property, which still attaches to the joint family impartible estate is the right of survivorship which, of course, is not inconsistent with the custom of impartibility. For the purpose of devolution of the property, the property is assumed to be joint family property and the only right which a member of the joint family acquires by birth is to take the property by survivorship but he does not acquire any interest in the property itself. The right to take by survivorship continues only so long as the joint family does not cease to exist and only manner by which this right of survivorship could be put an end to is by establishing that the estate ceased to be joint family property for the purpose of succession by proving an intention, express or implied, on behalf of the junior members of the family to renounce or surrender the right to succeed to the estate. In the latest case *Anant Bhikappa v. Shankar Ramchandra*¹, the judicial committee clearly affirmed the principle that the property was not held in coparcenary.

"Now an impartible estate is not held in coparcenary (*Rani Sartaj Kauri v. Rani Deoraj Kuari*², though it may be joint family property. It may devolve as joint family property or as separate property of the last male owner. In the former case, it goes by survivorship to that individual, among those male members who in fact and in law are undivided in respect of the estate, who is singled out by the special custom, e.g., lineal male primogeniture. In the latter case jointness and survivorship are not as such in point: the estate devolves by inheritance from the last male owner in the order prescribed by the special custom or according to the ordinary law of the inheritance as modified by the custom."

18. We proceed to consider the next question arising in this appeal namely whether the agreement of 1889 in so far as it related to payment of maintenance allowance of Rs. 1,000 p. m. to

plaintiffs 1 to 4 continues to be in force even after the abolition of the estate and the vesting of the Zamindari estate in the Government under the Abolition Act. It was argued on behalf of defendant No. 1 that plaintiffs have enjoyed the benefit of payment under section 45(5) of the Abolition Act and got capitalised by the Tribunal the maintenance rights on the basis of the extinction of the Estate. Section 45 (1), (4) and (5) of the Abolition Act states :

"45. (1) In the case of an impartible estate which had to be regarded as the property of a joint Hindu family for the purpose of ascertaining the succession thereto immediately before the notified date, the following provisions shall apply."

* * *

(4) The portion of the aggregate compensation aforesaid payable to the maintenance-holders shall be determined by the Tribunal and notwithstanding any arrangement already made in respect of maintenance whether by a decree or order of a Court, award or other instrument in writing or contract or family arrangement, such portion shall not exceed one-fifth of the remainder referred to in sub-section (3), except in the case referred to in the second proviso to section 47, sub-section (2).

(5) (a) The Tribunal shall, in determining the amount of the compensation payable to the maintenance holders and apportioning the same among them, have regard, as far as possible, to the following considerations, namely :—

(i) the compensation payable in respect of the estate ;

(ii) the number of persons to be maintained out of the estate ;

(iii) the nearness of relationship of the person claiming to be maintained ;

(iv) the other sources of income of the claimant ; and

(v) the circumstances of the family of the claimant.

(b) For the purpose of securing (i) that the amount of compensation pay-

1. (1943) 2 M.L.J. 599 : (1943) L.R. 70 I.A. 232 at 243

2. (1888) L.R. 15 I.A. 51.

able to the maintenance holders does not exceed the limit specified in sub-sections (4) and (ii) that the same is apportioned among them on an equitable basis the Tribunal shall have power, wherever necessary, to re open any arrangement already made in respect of maintenance whether by a decree or order of a Court, award, or other instrument in writing, or contract or family arrangement.

Under the Agreement of 1889 plaintiffs 1 to 4 are entitled to an allowance of Rs 1,000 if paid out of the income of the Zamindari, that is to say, the income of the Venkatagiri Estate strictly so called and the income of the properties which did not get transferred to the Government under the Abolition Act. The Madras Impartible Estates Act 1904, provides by section 9 for the payment of maintenance of junior members of an impartible Zamindari family.

"9 Where for the purpose of ascertaining the succession to an impartible estate the estate has to be regarded as the property of a joint Hindu family, the following persons shall have a right of maintenance out of the impartible estate and its income, namely —

(a) the son grandson, or great grandson in the male line born in lawful wedlock or adopted of the proprietor of the impartible estate or of any previous proprietor thereof

Provided that where maintenance is payable to a son or grandson by or under any decree or order of Court, award, contract, family arrangement, or other instrument in writing and such instrument, expressly or by necessary implication makes it clear that the maintenance is payable to such son or grandson as representing his branch of the family, it shall not be open to a son or grandson of such son or to a son of such grandson as the case may be during the period of which such maintenance is payable to claim maintenance either in his individual right or as representing his branch of the family,

(b) the widow of any previous proprietor of the impartible estate so long as she does not re marry,

(c) the widow of the son, grandson or great grandson of the proprietor of the impartible estate or of any previous proprietor thereof, so long as she does not re marry, provided she has no son or grandson living,

(d) the unmarried daughter born in lawful wedlock of the proprietor of the impartible estate or any previous proprietor thereof, and

(e) the unmarried daughter, born in lawful wedlock of a son or grandson of the proprietor of the impartible estate or of any previous proprietor thereof, provided she has neither father nor mother nor a brother living

Explanation — Maintenance shall where necessary include a provision for residence and in the case of an unmarried daughter of the proprietor or any previous proprietor a provision for the expenses of her marriage in accordance with the scale customary in the family "

Where there is in force an agreement relating to payment of maintenance the Act does not authorise reduction of the quantum of maintenance provided by such agreement except in the circumstances stated in section 14 (2)—circumstances which are not applicable to the present case. It is admitted that junior members of the Venkatagiri family were receiving maintenance under the Agreement of 1889 until the coming into force of the Abolition Act.

19 Section 54 (2) of the Abolition Act provides for the ascertainment of the amount of maintenance payable to persons who before the notified date were entitled to maintenance out of the estate and its income either under section 9 or section 12 of the Madras Impartible Estates Act or under any contract or family arrangement. The total sum payable to the maintenance-holders out of the compensation should not under section 45 (4) exceed one fifth of the remainder of the compensation after the claims of creditors are satisfied. It is not possible to accept the argument of defendant No 1 that section 45 should be construed as extinguishing the right secured to junior members under the provisions of contract or family arrangement granting a new right limited to the

measure stated in the section. It is manifest that section 45 is concerned only with the apportionment of compensation amount. The section is concerned with the rights and liabilities in relation to properties which are represented by the compensation. There may be a case of an impartible Zamindari where the properties not transferred under section 3 (b) are quite as valuable as the properties transferred. If, in such a case, there is a contract or family arrangement for the payment of maintenance, such a contract or family arrangement would as regards the quantum of the allowance, have some relation to the total income of the properties of the Zamindari. In the absence of express words to that effect, it would not be right in our opinion to attribute to the Legislature an intention to free the properties not transferred to the Government by the operation of section 3 (b) of the Act from liability to contribute towards the maintenance of the junior members under such a contract of family arrangement, and, while leaving the landholder in possession of those other properties, limit the maintenance holders to a share of a fifth of the compensation amount. We are therefore unable to accept the argument that sections 45 to 47 of the Abolition Act have the effect of extinguishing any rights which the junior members of the zamindari family may have had before the notified date to receive maintenance out of the entire income of the zamindari under the contract or family arrangement. It follows that the agreement of 1889 in so far as it relates to payment of maintenance of Rs. 1,000 p. m. to plaintiffs 1 to 4 continues to be in force in spite of the coming into operation of the Abolition Act.

20. Under the Agreement of 1889 plaintiffs 1 to 4 are entitled to payment of Rs. 1,000 per month from the income of the Venkatagiri Zamindari. That part of the zamindari which consisted of the Venkatagiri Estate has been converted into compensation deposited and to be deposited in the office of the Tribunal. The first defendant and plaintiffs 1 to 4 would also be entitled to ryotwari pattas under sections 12 and 47 of the Abolition Act. It is not disputed that plaintiffs 1 to 4 have been paid

Rs. 75,000 when the second instalment of compensation is deposited by the Government. If additional compensation is allowed under section 54-B of the Abolition Act, plaintiffs 1 to 4 would get a part of such additional compensation. The trial Judge calculated that plaintiffs 1 to 4 have been paid total amount of compensation to the extent of Rs. 1,37,000. Interest on this amount at $3\frac{1}{2}$ per cent per annum works out to Rs. 4,795 per annum. The trial Judge directed that plaintiffs 1 to 4 would be entitled to payment of such additional sums which together with interest would add upto Rs. 1,000 p.m. In other words the plaintiffs 1 to 4 were held entitled to recover from defendant No. 1 the difference between the interest payable on the compensation amount and the sum of Rs. 1,000 p. m. and the difference was made a charge on items 1, 14 and 16 of Schedule B properties. The trial Judge directed that interest should be calculated at $3\frac{1}{2}$ per cent per annum on the compensation amount. In our opinion the proper rate of interest should be $5\frac{1}{2}$ per cent. per annum. Subject to the modification we consider that the decree granted by the trial Judge should be restored. If during any part of the period subsequent to 7th September, 1949, plaintiffs 1 to 4 have not been in receipt of the amount of Rs. 1,000 per month calculated in the above manner they would be at liberty to file an application for the recovery of such sums as may be needed to make up the allowance to Rs. 1,000 per month for that period. For such decree as may be passed on such application a charge is created on items 1, 14 and 16 of plaintiff Schedule B properties.

21. We pass on to consider the question whether plaintiffs 5 to 7 are also entitled to maintenance at the rate of Rs. 1,000 p. m. according to the agreement of 1889. Plaintiffs 5 and 6 are illegitimate sons of Raja Venugopal, the youngest of the four brothers who entered into the Agreement. The seventh plaintiff is the son of the 5th plaintiff. The material part of the document states :

“After the life of the said Sri Venugopala Krishna Yachendru, his *purusha santhathi*, shall, in perpetuity, be paid, the same allowance amount.

that is, at the rate of rupees one thousand (Rs 1,000) per month in the aforesaid manner. But, if, at any time, in any one of the branches of the said Sri Muthukrishna Yachen drulu, Sri Venkatakrishna Yachendrulu and Sri Venugopala Krishna Yachen drulu, there be more than one male member such males and their *purusha santhathi* shall take the said allowance amount of rupees one thousand in proportion to their respective shares, in the same manner as they would respectively take their other properties separately by way of inheritance according to the Hindu Law."

The Subordinate Judge, Nellore, held in C S No 30 of 1932 that plaintiffs 5 and 6 were not the *purusha santhathi* of Venugopal. The decision was affirmed by the High Court in *Maharajah of Venkatagiri v Raja Rajeswara Rao*¹ and an appeal against the judgment of the High Court was dismissed by the Judicial Committee. That decision is binding upon the plaintiffs 5 and 6 on the ground of *res judicata*. The seventh plaintiff as the son of the 5th plaintiff can claim no higher rights than the 5th plaintiff. It was contended that plaintiffs 5 to 7 were entitled to claim that allowance under certain other clauses of the agreement of 1889. Reference was made to the following clauses

"Moreover if in any of the aforesaid three branches of our family viz, the branch of Sri Muttukrishna Yachendrulu the branch of Venkatakrishna Yachendrulu and the branch of the minor Sri Venugopala Krishna Yachendrulu any male should die without *purusha santhathi* either by way of *aurasa* or by way of adoption the allowance amount that was being received by the person who so died without *purusha santhathi* shall go to the *gnatis* (agnates) who are nearest to him in his own branch according to Hindu Law. Should the aforesaid person who dies without *purusha santhathi* leave any widow or widows and maintenance has to be paid to them only the nearest *gnatis* who get the allowance of such

deceased person in the manner mentioned above shall be liable therefor. Further should any of the said three branches of our family become extinct by the total absence of *purusha santhathi* either by way of *aurasa* or by way of adoption, the allowance being paid to that branch shall be stopped subject to the condition that, if there be then a widow or widows left of the last male who died in that branch, one half of the allowance of rupees one thousand (Rs 1,000) that was being paid to that male namely, Rupees five hundred (Rs 500) shall be paid to the widow or widows of the person who so died without *purusha santhathi* as maintenance for life."

This clause provides that on the death of any male member entitled to maintenance allowance under the deed without leaving any male issue either by birth or adoption the allowance which was received by that person should go according to Hindu Law to the *gnatis* who in the same line as the deceased are nearest to such deceased member. Plaintiffs 5 to 7 alternatively claimed to be the *gnatis* of Venugopal. In our opinion it is not open to plaintiffs 5 to 7 to re-agitate the matter which should have been pressed as a ground of claim in the previous suit. In any case the argument is without substance. It is true that the word *gnati* in Sanskrit literally interpreted includes a brother also. But in the context of the particular passage in the agreement it could not have been the intention of the parties that when there was a failure of legitimate or adopted son, *gnatis* including illegitimate sons would take the allowance. The question in reality is not whether an illegitimate brother is a *gnati* or not for purposes of succession but whether the word is used in that unusual sense in the Agreement. As pointed out in the previous case this clause has no application and the case is really governed by the earlier clause already referred to. We accordingly reject the argument of plaintiffs 5 to 7 on this aspect of the case.

22 Lastly it was contended on behalf of plaintiffs 1 to 4 that they were entitled to one-third share of the golden howdah sub-item 8 of item No 8 of B Schedule. The only evidence upon which plaintiffs

relied was clauses 5 and 6 in the will of Rajagopalakrishna dated 22nd September, 1910, which states :

“ Our Venkatagiri Samasthanam is an ancient and impartible estate. It has also been established by the Madras Act II of 1902 that it is an impartible zamindari. The village and other landed properties in the talukas of the aforesaid ancient Venkatagiri Zamindari acquired by my ancestors, and myself, as well as the houses, bungalows, forts, gardens, places, etc., possessed by us in the four places, viz., Nellore, Kalahasthi, Madras and Banares those within and around Venkatagiri, and those in other taluks—all these have been included in the impartible estate. All these, as well as elephants, horses, carriages, ambaris, howdahs, Honzas (seat) and furniture exclusive of those made of silver and gold were treated as such impartible even in the partition between me and my youngest brother. They shall hereafter also remain as such.”

It is evident from this clause that what was treated as impartible were Ambaris, Honzas and furniture exclusive of those made of silver and gold. In other words silver and gold howdahs were not treated as impartible. Counsel on behalf of defendant No. 1 referred to paragraphs 5 and 6 of the will which are to the following effect :

“ Further, as many matters under dispute between myself and my brothers have to be settled, the value of some goldware, silver were jewel of precious stones etc, belonging to the estate Regalia was paid to my brothers from out of my self-acquired money and I have taken possession of these items at the time of partition. Besides these, some more jewels of precious stones etc, which were acquired, were paid for from my self-acquired money and have been received by me.”

Clause 6 runs thus :

“ The jewels made of precious stones as well as gold and silverware which fell to my share from out of the aforesaid share inclusive of those which

have been improved and converted and mentioned in detail in Schedule A appended hereto. The jewels set with precious stones and gold and silver were got by me from my brothers at the time of partition of paying their value to them (brothers) from out of self-acquired money.”

These clauses make it clear that the golden howdah had been divided and nothing was left for further division. In our opinion the Division Bench was right in taking the view that the plaintiffs 1 to 4 are not entitled to division of the golden howdah.

23. For the reasons expressed we hold that the judgment of the Division Bench dated 13th August, 1965, should be set aside. It is declared that plaintiffs 1 to 4 are entitled under the Agreement of 1889 to be paid Rs. 1,000 p. m. out of the income of the Venkatagiri Zamindari. Out of the compensation amounts paid to plaintiffs 1 to 4 interest shall be calculated at 5½ per cent. per annum. If the interest so calculated falls short of Rs. 1,000 per month, plaintiffs 1 to 4 are entitled to the payment of such additional sums as would enable them to be in receipt of a total income of Rs. 1,000 per month. If for any period subsequent to 7th September, 1949, plaintiffs 1 to 4 have not received allowance of Rs. 1,000 p. m. they are granted liberty to file an application for the recovery of such sums as may be needed to make up the allowance to Rs. 1,000 for that period. For such decree as may be passed on such application a charge would be created on items 1, 14 and 16 of plaint B Schedule properties. The suit is dismissed so far as plaintiffs 5 to 9 are concerned. The appeal is allowed to the extent indicated above with proportionate costs.

V.M.K.

*Appeal partly
allowed.*

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —J C Shah, V Ramaswami
and A N Grover, JJM/s V O Tractoroexport, Moscow
Appellant*

v

M/s Tarapore & Co, Madras and
another Respondents

Foreign Awards (Recognition and Enforcement Act LV of 1961) section 3— Interpretation— A submission made in pursuance of an agreement if mean an actual or completed reference made pursuant to an arbitration agreement or an arbitration agreement that has come into existence as a result of a commercial contract—International Law to what extent overrides Municipal Law

On the question whether the words 'a submission made in pursuance of an agreement' in section 3 of the Act mean an actual or completed reference made pursuant to an arbitration agreement or they mean an arbitration agreement that has come into existence as a result of a commercial contract

Held by majority J C Shah and A N Grover JJ, and (V Ramaswami, J, dissenting)

The first critical expression 'submission' can have both the meanings in view of the historical background of the legislation which was enacted to give effect to the Protocol and the conventions. If this term is to be given the larger meaning of including of 'an agreement to refer' as also 'an actual submission' of a particular dispute, it has to be determined which meaning would be appropriate in the context in which the term 'submission' has been used in section 3 of the Act. If submission means 'agreement to refer or an arbitral clause in a commercial contract' it makes the entire set of words unintelligible and completely ambiguous. It is difficult to comprehend in that case

why the Legislature should have used the words which follow the term 'submission' namely, 'made in pursuance of an agreement'. This brings to the true import of the expression 'agreement'. If by 'agreement' is meant a commercial contract (of the nature mentioned in the 'Merak' case, (1965) 2 W L R 250) the words 'made in pursuance of' convey no sense. The word 'agreement' in the second part of section 3 can have reference to and mean not the commercial contract to which the convention set forth in the Schedule applies but only the agreement to refer or the arbitral clause. Unless the context so compels or requires the same meaning must ordinarily be attributed or given to the same words used in the section. The above difficulties completely disappear if 'submission' is given the second meaning of an actual submission of a particular dispute or disputes to the authority of a particular arbitrator. If section 3 cannot be so read as to permit the meaning of the word 'submission' to be taken as an arbitral clause or an agreement to refer, the Courts would not be justified in so straining the language of the section as to ascribe the meaning which cannot be warranted by the words employed by the Legislature [Para 18]

Per Ramaswami, J [dissenting]

As far as practicable, the municipal law must be interpreted by the Courts in conformity with international obligations which the law may seek to effectuate. It is well settled that if the language of a section is ambiguous or is capable of more than one meaning the protocol itself becomes relevant for there is a *prima facie* presumption that Parliament does not intend to act in breach of international law including specific treaty obligations. Applying this principle to the present case it is manifest that Article 2 of the Convention which is contained in the Schedule to the Act imposes a duty on the Court of a contracting State when seized of such an action to refer the parties to arbitration. Section 3 of the Act must therefore be read in consonance with this international obligation any interpretation of section 3 which would restrict the obligation or impose a refinement not warranted by the Convention itself will

*C.A. Nos. 1208, 1209 1833 and 1834 of 1969
28th October 1969

not be justified. So read, the word "submission" must mean the arbitral clause itself and the word "agreement", the commercial or the business agreement which includes or embodies that clause. [Paras. 41, 42.]

Appeals by Special Leave from the Judgment and Order dated the 16th December, 1968 of the Madras High Court in O. S. Appeals Nos. 25 and 28 of 1968. Appeals by Special Leave from the Judgment and Order, dated the 12th April, 1968 of the Madras High Court in Applications Nos. 105 and 106 of 1968 in C.S. Nos. 118 of 1967.

S. Mohan Kumarmangalam and M. K. Ramamurthi, Senior Advocates, (*S. M. Ali Mohd, Mrs. Shyamala Pappu, J. Ramamurthy, Vineet Kumar and C. R. Somasekharan*, Advocates, with them), for Appellant.

V. P. Raman, S. N. Srivatsa, B. Datta and D. N. Mishra, Advocates and *J. B. Dadachanji*, Advocate of *M/s. J. B. Dadachanji & Co.*, for Respondent No. 1

Rameshwar Nath and Mahinder Narain, Advocates of *M/s. Rajinder Narain & Co.*, for Respondent No. 2.

The Judgments of the Court were delivered by

Grover, J.—These connected appeals which involve points of importance and interest in international commercial arbitration arise out of a suit instituted on the original side of the High Court of Judicature at Madras by *M/s. Tarapore & Co.*, against *M/s. V. O. Tractoroexport, Moscow*.

2. Initially the claim was for a permanent injunction restraining the Russian firm from realizing the proceeds of a Letter of Credit opened on 9th June, 1965, with the Bank of India, Ltd., Madras, which had also been impleaded as a defendant. Subsequently by an amendment of the plaint the plaintiff has confined relief to recovery of damages.

3. The facts chronologically are as follows : A contract was entered into on 2nd February, 1965, between the Indian and the Russian firms for the supply of earth-moving machinery for

a value of Rs. 66,09,372.00. The machinery was required by the Indian firm for executing the work of excavation of a feeder canal as part of the Farraka Barrage Project. On 9th June, 1965, the Indian firm opened a Letter of Credit with the Bank of India Ltd., for the entire value of the machinery in favour of the Russian firm. The consignments started arriving at Calcutta in October, 1965. On 22nd February, 1966, the Indian firm wrote to the Russian firm saying that there was something wrong with the design and working of motorised scrapers which had been supplied and which formed one of the items of machinery covered by the contract. On 6th June, 1966, came the devaluation of the Indian rupee by 57.48 per cent. as a result of which the amount that became payable by the Indian firm to the Russian firm under the contract increased by Rs. 25 lakhs or so. On 20th June, 1966, the Russian firm demanded an increase in the Letter of Credit owing to the devaluation. On 1st August, 1966, the Indian firm served a notice on the Russian firm containing the main allegations relating to breach of contract on the part of the Russian firm. The latter was called upon to remedy the breaches and pay compensation. It was made clear that until this was done the Russian firm would not be entitled to encash the Letter of Credit for the balance amount. On 4th August, 1966, the Indian firm filed a suit on the original side of the Madras High Court and obtained an *ex parte* order of injunction in respect of the operation of the Letter of Credit. On 14th August, 1966, the parties arrived at a settlement at Delhi after mutual discussion.

4. Pursuant to the agreement the suit was withdrawn by the Indian firm but no amicable settlement, as contemplated, took place. The Indian firm instituted a suit (No C.S. 118 of 1967) on the original side of the Madras High Court on 14th August, 1967. It also filed an application for an interim injunction in the matter of the operation of the Letter of Credit. On 26th October, 1967, another application was filed for an interim injunction against the encashment of the devaluation drafts. On 4th November, 1967, the Russian firm instituted proceedings in terms of the

arbitral clause in the contract before the Foreign Trade Arbitration Commission of the U S S R Chamber of Commerce, Moscow. On 14th November 1967, the Russian firm entered appearance under protest before the Madras High Court in the suit filed by the Indian firm. On the same date the Russian firm filed an application under section 3 of the Foreign Awards (Recognition and Enforcement) Act XLV of 1961 hereinafter called the Act. A prayer was made for stay of the suit. On 15th January 1968 the Indian firm filed an application for an interim injunction restraining the Russian firm from taking any further part in the arbitration proceedings at Moscow. We are not concerned with the branch of the litigation which came up to this Court at a prior stage in respect of the interim injunctions granted by the Single Judge with regard to the operation of the Letter of Credit and the subsequent arrangement made for payment as a result of devaluation. It is sufficient to mention that the appeals brought to this Court were allowed on 26th November, 1968, and the temporary injunction granted by the learned Single Judge relating to the operation of the Letter of Credit was vacated.

5 The application which had been filed by the Russian firm for stay of the suit under section 3 of the Act was dismissed by Ramamurthi, J. on 12th April, 1968. The application of the Indian firm for an interim injunction restraining the Russian firm from taking any further part in the arbitration proceedings at Moscow was, however, granted. The Russian firm preferred appeals against the orders of the learned Single Judge before a Division Bench. The bench maintained the orders of Ramamurthi, J. The present appeals have been brought by the Russian firm by Special Leave both against the order of the Division Bench and against the judgment of the learned Single Judge. This was presumably done because there was some controversy about the finality of the orders which had been made by the Single Judge of the High Court.

6 The questions which have to be determined in these appeals are quite narrow. The first question is whether

the words 'a submission made in pursuance of an agreement' mean an actual or completed reference made pursuant to an arbitration agreement or they mean an arbitration agreement that has come into existence as a result of a commercial contract. According to the appellant firm whenever there is an arbitration agreement or an arbitral clause in a commercial contract of the nature mentioned in the Convention the Court is bound to stay the suit provided the other conditions laid down in section 3 are satisfied. On this approach the word "submission" is to be understood as an arbitration agreement or arbitral clause relating to existing or future differences and the word agreement means an agreement of a commercial or business character to which the convention applies. The respondent firm maintains that the critical words "submission and agreement" must be given their natural and grammatical meaning and the word submission made in pursuance of an agreement can only mean an actual submission of the disputes to the arbitral tribunal. The word agreement can have reference to and can be construed only in the sense of an arbitration agreement or an arbitral clause in a commercial contract. It cannot mean a commercial contract because an arbitration agreement cannot be stated to have been made pursuant to a commercial contract. In other words, if 'submission' has to be taken in the sense of an arbitration agreement it would render the words submission made in pursuance of an agreement meaningless and unintelligible. The second question relates to the jurisdiction of the Courts in this country to grant an injunction restraining a party which is in Moscow from proceeding with the conduct of arbitration before a tribunal there. Even if the Courts have jurisdiction to grant an injunction it is said it would not be a proper exercise of that jurisdiction in the circumstances of the present case to give an injunctory relief. The learned Single Judge has decided certain other controversial issues but the Division Bench did not go into them nor do we propose to deal with them unless the decision on the true and correct interpretation of section 3 of the Act goes in favour of the appellant firm.

7. The Act has been enacted to enable effect to be given to the convention on the recognition and enforcement of foreign arbitral awards done at New York on 10th June, 1958, to which India is a party. In the statement of objects and reasons it has been pointed out that the procedure for settlement through arbitration of disputes arising from international trade was first regulated by the Geneva Protocol on Arbitration Clauses 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards to which India was a party and which was given effect to in India by the Arbitration (Protocol and Convention) Act, 1937.

8. The provisions of the Act may be noticed. Sections 2 and 3 are in these terms :

Section 2. "In this Act unless the context otherwise requires, 'foreign awards' means an award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India made on or after the 11th day of October, 1960—

(a) In pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies ; and

(b) In one of such territories as the Central Government being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies "

Section 3 "Notwithstanding anything contained in the Arbitration Act, 1940, or in the Code of Civil Procedure, 1908, if any party to a submission made in pursuance of an agreement to which the Convention set forth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred any party to such legal proceedings may, at any time after appearance and

before filing a written statement or taking any other step in the proceedings, apply to the Court to stay the proceedings and the Court unless satisfied that the agreement is *null* and *void*, *inoperative* or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred shall make an order staying the proceedings."

The Schedule contains the Convention on the recognition and enforcement of foreign arbitral awards Article II may be reproduced with advantage

ARTICLE II

"1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not concerning a subject-matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegram.

3. The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is *null* and *void*, *inoperative* or incapable of being performed."

9. In order to resolve the controversy on the first question the history of the International Protocols and Conventions as a result of which legislation had to be enacted in England and India as also the relevant provisions of the Arbitration law may be set out. The Geneva Protocol on Arbitration Clauses, 1923, recognised the validity of an agreement between each of the Contracting States whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which

the parties to a contract agreed to submit to arbitration all or any differences that might arise in connection with such contract relating to commercial matters or to any other matter capable of submission by arbitration whether or not the arbitration was to take place in a country to whose jurisdiction none of the parties was subject Article 4 of the Protocol was as follows

"The tribunals of the contracting parties, on being seized, of a dispute regarding a contract made between persons to whom Article applies and including an arbitration agreement whether referring to present or future differences which is valid in virtue of the said Article and capable of being carried into effect shall refer the parties on the application of either of them to the decision of the arbitrat-
tors

In order to give effect to this Protocol the Arbitration Clauses (Protocol) Act 1924, was enacted in England Section 1 (1) of that Act contained provisions similar to section 3 of the Act with certain differences When the aforesaid Act of 1924 was enacted the meaning of 'submission' as contained in section 27 of the English Arbitration Act 1889 was "a written agreement to submit present or future differences to arbitration whether an arbitrator was named there in or not"

10 The Arbitration (Foreign Awards) Act, 1930 was enacted to give effect "to a certain convention on the execution of arbitral awards and to amend subsection (1) of section 1 of the Arbitration Clauses (Protocol) Act, 1924, which provision was described in section 8 as one "for staying of legal proceedings in a Court in respect of matters to be referred to arbitration under agreements to which the Protocol applies The Arbitration Act, 1889 was amended by the Arbitration Act of 1934 which also provided for other matters relating to arbitration law in England In subsection (2) of section 21 the expression 'arbitration agreement' was defined to mean "a written agreement to submit present or future differences to arbitration whether an arbitrator was named therein or not"

11 Although the definition of the expression "arbitration agreement" was introduced by the amendment made by the Arbitration Act of 1934, the definition of the word "submission" contained in section 27 of the Arbitration Act of 1889 remained unaffected and unchanged To complete the history of legislation in England mention may be made of the Arbitration Act, 1950, which repealed the earlier enactments Section 4 (2) of this Act provided for stay when legal proceedings were commenced in Court by any party "to a submission to arbitration made in pursuance of an agreement to which the Protocol set out in the First Schedule to this Act applies The Schedule to this Act contained the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 In this Act the definition of "submission" contained in the Act of 1889 was omitted By section 32 "arbitration agreement" was defined to mean "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not"

12 In India the Arbitration (Protocol and Convention) Act, 1937, was enacted for the first time to give effect to the Protocol and the Convention of 1923 and 1927 respectively This was done as the Government wanted to meet the widely expressed desire of the commercial world that arbitration agreements should be ensured effective recognition and protection Section 3 of the 1937 Act employed the same language as is contained in section 3 of the Act except with some minor differences Both the Geneva Protocol of 1923 and the Convention of 1927 were appended as Schedules to this Act So far as the ordinary arbitration law was concerned prior to the enactment of the Indian Arbitration Act, 1940 there were two sets of laws applicable to what were called Presidency towns and areas which did not fall within those towns The Indian Arbitration Act, 1899, applied to cases where the subject matter submitted to arbitration was of a nature that if a suit were to be instituted it could be instituted in a Presidency Town Section 4 (b) contained the definition of the word 'submission' which was

similar to the definition in the English Act of 1889. In the Civil Procedure Code of 1882, Part V dealt with arbitration. These provisions were applicable to such areas which were outside the Presidency towns. When the Civil Procedure Code, 1908, was enacted it contained in the II Schedule similar provisions for arbitration. There was, however, no definition of "submission" or "arbitration agreement". The Arbitration Act, 1940, was meant to consolidate and amend the law relating to arbitration in India. The word "submission" was not defined but the word "arbitration agreement" in section 2 (a) was stated to mean a written agreement to submit present or future differences to arbitration whether the arbitrator was named therein or not.

13. The phraseology which has been employed in the English statute and the Indian enactment for giving effect to the Protocol and the Conventions relating to arbitration is practically the same. In the English Act of 1924, the words used were identical with the words to be found in section 3 of the Act, namely, "a submission made in pursuance of an agreement". The only change which has been effected in the English Arbitration Act of 1950 in section 4 (2) is that the words "to arbitration" have been inserted within the words "submission" and "made". Among the authoritative text book writers there has been a good deal of divergence of opinion on the meaning of the above phraseology. In the 8th Edn. of the Conflict of Laws by Dicey and Morris, Rule 182 has been formulated which is based on section 4 (2) of the English Arbitration Act, 1950. Referring to section 4 (2) and the meaning of the words "a submission to arbitration made in pursuance of an agreement to which the Protocol applies" the authors are of the view that this condition is satisfied if the parties have agreed to submit present or future disputes to arbitration. The Court is, according to them, under a duty to stay proceedings although no arbitrators have been appointed. The word "submission" must be regarded as synonymous with the term "arbitration agreement" in the Protocol and the term "agreement to which the Protocol applies" is used "to identify

the commercial or business contract between the parties." This statement is based on the judgment of Scarman, J., in *Owners of Cargo on Board the Merak v. The Merak (Owners)*¹. Even before the pronouncement of this judgment preference for the view which later on came to be expressed by Scarman, J., had been indicated in the 7th Edn. of the same book. (See pages 1075 to 1076). According to the well known work of Russell on Arbitration, 17th Edn. the English translation of the Protocol is most obscure. This is what has been stated at page 79 :

"The words of the section, however, would seem to limit its operation to cases where some sort of "agreement to submit" is followed by an actual "submission" made pursuant to" it (Presumably, the word "submission" here bears its natural meaning, of a submission written or not) of an actual dispute to the authority of an arbitral tribunal, "rather than the statutory meaning which it bore under the 1889 Act and is now borne by the phrase "arbitration agreement". Thus the common case, of an agreement to refer which is never followed by a submission because the claimant prefers to sue instead, is apparently outside the section, although the Protocol clearly meant it to be covered; see the French text of Article 4"

The English translation of the French text in the 1950 Act has been stated to be a mistranslation. It has been suggested that the Parliament may have enacted not the true text of the Protocol but a very limited interpretation of the false translation. In Halsbury's Laws of England, Third Edn., Cumulative Supplement 1968, Vol II. Arbitration, page 2, reference has been made to the decision of Scarman, J., in *The Merak* which was affirmed on appeal and which has been followed in *Unipat A. G. v. Dowty Hydraulic Units*², the statement in the text being that this provision of law applies although no actual submission to arbitration has been made.

14. In *The Merak*, Scarman, J., read section 4 (2) of the Act of 1950 with the

1. (1965) 2 W.L.R. 250.

2. (1967) R.P.C. 401.

translation of the Protocol in the First Schedule to the Act. According to him the Protocol was concerned with two agreements—one a contract commercial in character or giving rise to a difference relating to matters that were either commercial or otherwise capable of settlement by arbitration between parties subject to the jurisdiction of different contracting States, the other an arbitration agreement whereby the parties to such a contract agreed to submit their differences to arbitration (The arbitration agreement might be itself included in and simultaneous with the commercial or business contract). Section 4 (2) of the Act was intended to make the same distinction between the parties' business contract and their arbitration agreement. He proceeded to say

'It uses the term "submission to arbitration" to identify the protocol's agreement to submit their differences to arbitration and the term "agreement to which the protocol applies" to identify the commercial or business contract between the parties. Section 4 (2) in my opinion applies to agreements to submit to arbitration made in pursuance of a contract to which because of its character and the character of its parties the protocol applies. The words in pursuance of 'merely establish the link that there must be between the agreement to submit present or future differences to arbitration and the agreement of a commercial or business character between parties of a certain class to which the protocol applies. They have in this context no temporal significance.

15 One of the main reasons which prevailed in *The Merak* was that by construing "submission to arbitration" as an actual submission of an existing dispute to a particular arbitrator, it would make 'non sense of the protocol'.

16. Now as stated in Halsbury's Laws of England Vol 36 page 414, there is a presumption that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations and statutes are to be interpreted provided

that their language permits, so as not to be inconsistent with the comity of nations or with the established principles of International Law. But this principle applies only where there is an ambiguity and must give way before a clearly expressed intention. If statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations or International Law.

17 We may look at another well recognised principle. In this country, as is the case in England, the treaty or International Protocol or convention does not become effective or operative of its own force as in some of the continental countries unless domestic legislation has been introduced to attain a specified result. Once the Parliament has legislated the Court must first look at the legislation and construe the language employed in it. If the terms of the legislative enactment do not suffer from any ambiguity or lack of clarity they must be given effect to even if they do not carry out the treaty obligations. But the treaty or the Protocol or the convention becomes important if the meaning of the expressions used by the Parliament is not clear and can be construed in more than one way. The reason is that if one of the meanings which can be properly ascribed is in consonance with the treaty obligations and the other meaning is not so consonant the meaning which is consonant is to be preferred. Even where an Act had been passed to give effect to the convention which was scheduled to it, the words employed in the Act had to be interpreted in the well established sense which they had in municipal law (*See Barras v Aberdeen Steam Trawling and Fishing Co, Ltd*).

18 The approach in "*The Merak*" appears to have been dominated by the Protocol of 1923 and the question to be examined is whether the language of section 4 (2) of the English Act of 1950 and section 3 of the Act contains any such ambiguity or suffers from any such lack of clarity as would justify the use of the Protocol to the extent

made in the English case. The term 'submission' as defined in the English Act of 1889 and the Indian Act of 1899. was meant to cover both an arbitration clause by which the parties agreed that if disputes arose they would be referred to arbitration and also an actual submission of a particular dispute or disputes to the authority of a particular arbitrator. For the sake of convenience, a distinction could be made by calling the first "an agreement to refer" and the second, "a submission". The term "arbitration agreement" as defined by the English Act of 1950 and the Indian Act of 1940 also covers both "an agreement to refer" and "an actual submission." Turning to the words used in section 3 of the Act "submission made in pursuance of an agreement to which the convention set forth in the schedule applies", the first critical expression "submission" can have both the meanings in view of the historical background of the legislation which was enacted to give effect to the Protocol and the Conventions. If this term is to be given the larger meaning of including of "an agreement to refer" as also "an actual submission" of a particular dispute, it has to be determined which meaning would be appropriate in the context in which the term "submission" has been used in section 3 of the Act. If "submission" means "agreement to refer" or an "arbitral clause" in a commercial contract, it makes the entire set of words unintelligible and completely ambiguous. It is difficult to comprehend in that case why the Legislature should have used the words which follow the term "submission", namely, "made in pursuance of an agreement". This brings us to the true import of the expression "agreement." If by "agreement" is meant to a commercial contract of the nature mentioned in "The Merak", the words "made in pursuance of" convey no sense. Another anomaly which militates against the established rule of interpretation would arise if by the word "agreement" is meant a commercial contract. It cannot, even by stretching the language bear that meaning in the second part of section 3 which reads :

".....The Court unless satisfied that the agreement is *null and void*, inoperative

or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred shall make an order staying the proceedings."

Here "agreement" can have reference to and mean not the commercial contract to which the convention set forth in the Schedule applies but only the agreement to refer or the arbitral clause. Unless the context so compels or requires, the same meaning must ordinarily be attributed or given to the same words used in the section. The above difficulties completely disappear if "submission" is given the second meaning of an actual submission of a particular dispute or disputes to the authority of a particular arbitrator. The words which we are construing then have a clear, consistent and intelligible meaning, namely, an actual submission made in pursuance of an arbitration agreement or arbitral clause to which the convention set forth in the Schedule applies. The word "in pursuance of" are also thus saved and not rendered otiose. The Courts have to be guided by the words of the statute in which the Legislature of the country has expressed its intention. If section 3 cannot be so read as to permit the meaning of the word "submission" to be taken as an arbitral clause or an agreement to refer, the Courts would not be justified in so straining the language of the section as to ascribe the meaning which cannot be warranted by the words employed by the Legislature. We are aware of no rule of interpretation by which rank ambiguity can be first introduced by giving certain expressions a particular meaning and then an attempt can be made to emerge out of semantic confusion and obscurity by having resort to the presumed intention of the Legislature to give effect to international obligations.

19. It is true that by taking the above view the purpose and object behind the Protocol and the Conventions may not be fully carried out. The intention underlying Article 4 of the Protocol of 1923 and Article 2 of the Convention of 1958 undoubtedly appears to be that whenever the parties have agreed that their differences arising out of a commercial

contract be referred to an arbitration, the Court of a contracting State when seized of an action in the matter shall refer the parties to an arbitration unless it finds that the agreement is *null* and *void* or is inoperative or incapable of being performed. We apprehend it would hardly be conducive to international commercial arbitration not to have legislation giving full and complete effect to what is provided by the Protocol and the Conventions. We also share in full measure the anxiety and the effort of those who desire to respect the terms of international Protocols and Conventions in letter and spirit. But we are bound by the mandate of the Legislature. Once it has expressed its intention in words which have a clear signification and meaning the Courts are precluded from speculating about the reasons for not effectuating the purpose underlying the Protocol and the Conventions. The consistent view of the Indian Courts on the interpretation of the critical words in section 3 of the Act of 1937 has not been in favour of what prevailed in *The Merak*. In the leading case in *W. Wood & Son Ltd v. Bengal Corporation*¹ Chakravarti, C.J. while delivering the judgment of the Court, examined the various aspects of the question including the terms of the Protocol of 1923 and the Convention of 1927 and said:

If the agreement to which the Protocol applies is an agreement for arbitration there cannot possibly be an agreement in pursuance of that agreement. Section 3 must therefore be construed as contemplating a case where not only is there an arbitration agreement in force between the parties but there has also been an actual reference to arbitration.

20 The learned Single Judge has given some reasons why in England as also in India the Statutes insist upon an actual submission before a stay of the suit can be granted. It has been pointed out that in different countries the law relating to arbitration is naturally different. Actual submission has been made a condition precedent for granting stay but the Court has been left with no discretion in England and in India. In

some of the other countries the order for stay of a suit contrary to the arbitral clause is discretionary, there being no difference between the municipal arbitration and arbitration under the Protocol. It was presumably for this reason that the Parliament insisted upon a real dispute between the parties and an actual reference or submission to an arbitration to resolve the particular point or points in dispute as a condition for stay. We do not consider that it would be right to speculate about the reasons which prevailed with the Parliament in enacting section 3 of the Act in the language in which it has been done. It is abundantly clear that the Parliament did not employ language which would indicate an unequivocal intention that in the presence of an agreement to refer to an arbitral clause in a commercial contract the provisions for granting stay under the section would immediately become applicable irrespective of an actual submission or a completed reference. As it was open to the Legislature to deviate from the terms of the Protocol and the Conventions it appears to have given only a limited effect to the provisions of the 1958 Convention. A clear deviation from the rigid and strict rule that the Courts must stay a suit whenever an international commercial arbitration as contemplated by the Protocol and the Conventions, was to take place is to be found in section 3. It is of a nature which is common to all provisions relating to stay in English and Indian arbitration laws, the provisions being that the application to the Court for stay of the suit must be made by a party before filing a written statement or taking any other step in the proceedings. If the condition is not fulfilled no stay can be granted. It cannot thus be said that section 3 of the Act or similar provisions in the prior Act of 1937 or the English Statutes were enacted to give effect in its entirety to the strict rule contained in the Protocol and the Conventions.

21 Another significant feature which cannot escape notice is that the Parliament in England and India must be presumed to have been aware when the English Act of 1950 and the Act were enacted that the expression submission had been abandoned in the Arbit-

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[S.C. N.C. 16.]

J. C. Shah, C.J.
K. S. Hegde and
A. N. Grover, JJ.

**M/s. Karam Chand Thapar &
 Bros. Private Ltd. v.
 The Commissioner of
 Income-tax (Central),
 Calcutta.**

21—1—1971. C.A. No. 1286 of 1967.

**Capital receipt or revenue receipt—Com-
 pany running managing agency business—
 Termination of one among several agencies
 —Compensation for—Nature of receipt—
 Test—Indian Income-tax Act (XI of
 1922), sections 3, 4, 66.**

The assessee was functioning as the managing agents of 27 companies including M/s. Greaves Cotton & Co., Ltd., M/s. Greaves Cotton & Co., Ltd., was incorporated as a private company in about 1922, and its managing agents was the firm styled M/s. Greaves Cotton & Co. The company acquired a large block of shares in the managed company. M/s. Greaves Cotton & Co. released their managing agency rights in favour of the assessee on receiving Rs. 27,34,325. On 8th May, 1950, the managed company, viz., M/s. Greaves Cotton & Co., Ltd. was converted into a public company. Thereafter, the assessee was not entitled to any commission on sales, etc., in view of the provisions of the Indian Companies Act, 1913, as amended in 1939. Hence, a fresh agreement was entered into between the assessee and the managed-company on 10th May, 1950, under which the assessee was entitled to an office allowance of Rs. 5,000 per month and a commission of 10 per cent. of the net profits. The new managing agency agreement was to subsist for a period of 20 years with effect from 8th May, 1950. On 26th February, 1951, the directors of the managed company appointed a sub-committee to enquire into the question whether the managing agency should be terminated leaving the management of the managed company to the board of directors. The sub-committee reported on 16th March, 1951, that the managing agency should be terminated. On 17th March, 1951, the board of directors of the managed company approved the recom-

mendations. An extraordinary general meeting of the shareholders of the managed company approved the resolution of the board of directors on 31st March, 1951. That meeting also recommended a payment of Rs. 18 lakhs to the assessee as compensation. That resolution was communicated to the assessee on 3rd April, 1951, and the latter accepted it on 10th April, 1951. In the assessment for the assessment year 1952-53, the Income-tax Officer included a sum of Rs. 18 lakhs in the total income of the assessee on the ground that the payment of Rs. 18 lakhs by the managed-company was an advance remuneration and not a compensation on account of loss of employment. On appeal by the assessee, the Appellate Assistant Commissioner held that the amount in question represented compensation received by the assessee for the termination of its managing agency. The Tribunal, on further appeal, held that the receipt was capital receipt on the ground that the managing agencies held by the company represented sources from which it received its income by way of commission and, therefore, the termination of managing agency would represent destruction of a source of income. The High Court, on reference, held that the managing agencies held by the company were its stock-in-trade, and, therefore, the amount of Rs. 18 lakhs paid by the managed company to the assessee must be considered as a revenue receipt. On appeal to the Supreme Court,

Held, that the sum of Rs. 18 lakhs was capital receipt not assessable to income-tax.

In the determination of the question whether a receipt is capital or income, it is not possible to lay down any single test as infallible or any single criterion as decisive. The question must ultimately depend on the facts of the particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken into account in reaching a decision. That, however, is not to say that the question is one of fact, for these questions between capital and income, trading profit or non-trading profit, are questions which, though they may depend to a very great extent on the particular facts of each case, do involve

a conclusion of law to be drawn from those facts

Ordinarily, compensation for loss of office or agency is regarded as a capital receipt, but this rule is subject to an exception that payment received even for termination of an agency agreement would be revenue and not capital in the case where the agency was one of many which the assessee held and its termination did not impair the profit-making structure of the assessee but was within the framework of the business, it being a necessary incident of the business that existing agencies may be terminated and fresh agencies may be taken. But it is for the Income tax Department to clearly establish that the case fell within the exception to the ordinary rule.

Where, on a consideration of the circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor deprive him of what in substance is his source of income, termination of the contract being a normal incident of the business and such cancellation leaves him free to carry on his trade (freed from the contract terminated), the receipt is revenue, where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee's income the payment made to compensate for cancellation of the agency agreement is normally a capital receipt.

Held, further It is wholly impermissible for the High Court to disturb the findings of fact reached by the Tribunal. The Tribunal is the final fact finding authority. The facts found by it could be challenged only on certain recognised grounds. Neither the High Court nor the Supreme Court has jurisdiction to reappreciate the material on record to find out whether the facts found by the Tribunal are correct or not.

Held on facts In the present case, according to the findings of the Tribunal, the termination of the agency in question had resulted in the destruction of a source of income of the company. The Tribunal had arrived at the conclusion that the managing agencies held by the company represented the source from which it

received its income by way of commission. On applying these tests to the facts found by the Tribunal the receipt must be considered as a capital receipt. The High Court should not have taken upon itself the responsibility to go into the question whether the findings of fact reached by the Tribunal are correct. The only question that the High Court was called upon to determine was whether, on the facts found by the Tribunal, the receipt in question should not have been considered by the Tribunal as revenue receipt.

T K K.

Appeal allowed

[SC NC 17]

S M Sikri C.J.,
G K Mitter,
C A Vadialingam,
P Jaganmohan Reddy, and
I D Dua, JJ

Commissioner of Income tax,
Mysore, Bangalore v
The Mysore Electrical Industries
Ltd

27-4-1971 C A No 1794 of 1970

Sur-tax—Chargeable profits—Statutory deductions—Computation of capital of company—Appropriations towards reserves made on 8th August, 1963 out of profits of the year ending 31st March, 1963—Whether should be added to other items for computing capital as on 1st April, 1963—Companies (Profits) Sur-tax Act, 1964 (VII of 1964), Schedule II rule 1

On 8th August 1963 the directors of the assessee-company appropriated three different amounts towards three items of reserve out of the profits of the year ending 31st March 1963. The question arose whether these amounts should be added to other items for the computation of capital of the assessee-company as on 1st April 1963 in terms of rule 1 of the second schedule to the Companies (Profits) Sur tax Act 1964. The contention of the Department was that these appropriations having been made on the 8th August 1963 could not be treated as components of capital 'as on the first day of the previous year i.e. 1st April 1963, in terms of rule 1 to the second schedule and that these could only be taken into consideration

in the subsequent year commencing on the 1st April, 1964 on the ground that on the 1st of April, 1963 they only formed a part of the mass of undistributed profits, no portion of which had been earmarked or set apart for any particular purpose.

Held, that the determination of the directors to appropriate the sums mentioned to the three separate classes of reserves on the 8th August, 1963 must be related to the 1st of April, 1963 *i.e.* the beginning of the accounts for the new year and must be treated as effective from that day.

It is well known that the accounts of a company have to be made up for a year up to a particular day. In this case that day was the 31st March, 1963. If it was reasonably practicable to make up the accounts up to the 31st March, 1963 and present the same to the directors on 1st April, 1963 they could have made up their minds on that day and declared their intention of appropriating the said and other sums to reserves of different kinds. But the fact that they could not do so for the simple reason that the calculation and collection of figures of all the items of income and expenditure of the assessee-company for the year ending 31st March, 1963 was bound to take some time cannot make any difference to the nature or quality of the appropriation of the profits to reserves as determined by the directors after the 1st of April, 1963. Therefore, the three different amounts appropriated towards three items of reserves should be added to other items for computation of the capital of the assessee-company as on the 1st day of April, 1963.

T.K.K.

Appeal dismissed.

[S.C N.C. 18].

*J. M. Shelat,
I. D. Dua and
V. Bhargava, JJ*

*Shamba Prasad Singh v.
Phool Kumar.*

24-3-1971. C.A. No. 1655 of 1966.

(A) Hindu Law—Family arrangement—Requirements.

It is not necessary for a valid family arrangement that there must exist actual competitive claims or disputes or that the

arrangement must be backed by proper consideration. Even disputes likely to arise in future or preservation of family property and honour would be sufficient to uphold an arrangement *bona fide* made between the members of a family.

A family arrangement is based on an assumption of an anterior title and its acknowledgment in one to whom a property or part of it falls under the arrangement. Therefore, it is not necessary that there must exist an anterior title sustainable in law in such a person which the others acknowledge.

The arrangement has to be considered as a whole for ascertaining whether it was made to allay disputes, existing or apprehended, in the interest of harmony in the family or the preservation of property. It is not necessary that there must exist a dispute, actual or possible in the future, in respect of each and every item of property and amongst all members arrayed one against the other. It would be sufficient if it is shown that there were actual or possible claims and counter-claims by parties in settlement whereof the arrangement as a whole had been arrived at, thereby acknowledging title in one to whom a particular property falls on the assumption (not actual existence in law) that he had an anterior title therein.

(B) Co-sharer—Adverse possession—Claim of adverse possession by a co-sharer against another—Onus and nature of proof required.

On the question of adverse possession by a co-sharer against another co-sharer, the law is fairly well settled. Adverse possession has to have the characteristics of adequacy, continuity and exclusiveness. The onus to establish these characteristics is on the adverse possessor. Accordingly, if a person having title proves that he too had been exercising during the currency of his title various acts of possession, then the quality of those acts, even though they might not be sufficient to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from a person challenging by possession the title which he holds.

"As between co sharers, the possession of one co-sharer is in law the possession of all co sharers. Therefore, to constitute adverse possession on, ouster of the non-possessing co sharer has to be made out. As between them, therefore there must be evidence of open assertion of a hostile title coupled with exclusive possession of and enjoyment by one of them to the knowledge of the other. But, once the possession of a co sharer has become adverse as a result of ouster, a mere assertion of a joint title by the dispossessed co sharer would not interrupt the running of adverse possession. He must actually and effectively break up the exclusive possession of his co sharer by re entry upon the property or by resuming possession in such a manner as it was possible to do. The mere fact that a dispossessed co sharer comes and stays for a few days as a guest is not sufficient to interrupt the exclusiveness or the continuity of adverse possession so as not to extinguish the rights of the dispossessed co sharer.

In the present case the adverse possession by B was sufficiently interrupted by acts of possession by N and therefore his title was not extinguished by adverse possession.

V K *Appeal allowed*

[S C NC 19]

C A Vaidyalingham and
A N Rav JJ

Dr Harkishan Singh v
State of Punjab

25—3—1971 C.A No 430 of 1970

Punjab Civil Medical Service Class I (Recruitment and Conditions of Service) Rules (1940), Rules 5 and 9—Punjab Civil Medical Service—Appointment to selection grade by direct recruitment—Validity—Fixation of seniority

The argument that an appointment to the selection grade of Punjab Civil Medical Service could be only by promotion from Punjab Civil Medical Service Class I and not by direct appointment, is untenable. Rule 9 (2) does not contain any restrictive word that only members of the service shall be eligible to promotion to a selection grade. Direct appointment to selection

grade is not only contemplated in the rules particularly rules 5, 9 (2) and 9 (3) but is also the implicit idea inherent in the words "direct recruitment" and "direct appointment" in rule 5 for the purpose of attracting able and meritorious persons to the service including the selection grade.

There is another reason as to why the rules contemplate direct appointment to selection grade in proper cases. If it appears that there are not suitable persons in Class I time scale who can be promoted to the selection grade persons of ability will have to be brought into the selection grade from outside.

There are no specific rules in regard to the fixation of seniority in the selection grade in the case of a direct appointment. If that be so Dr P having been recruited by direct appointment earlier than the appellant Dr S, Dr P's seniority cannot be disturbed.

V K

Appeal dismissed

[S C NC 20]

S M Sikri, C.J

G K Mitter,

K S Hegde

A N Grover and

P Jagannathan Reddy, JJ

Bachan Singh v

Gauri Shankar Agarwal

26—3—1971 C.A No 1274 of 1970

Constitution of India (1950), Article 226
—Writ of *certiorari*—When may be issued

The learned single Judge who heard the writ petition did not come to a positive conclusion that the impugned order of the Board of Revenue was vitiated by any error of law apparent on the face of the record. The only conclusion that he arrived at was that on the material on record it was possible to urge certain questions of law and therefore it would be proper for the Board to examine those questions. This is an untenable approach. Unless a High Court is of the opinion that the order assailed suffers from errors of law apparent on the face of the record it has no jurisdiction to quash that order by having recourse to its *certiorari* jurisdiction on the ground of error of law.

V K

Appeal dismissed

[S.C. N.C. 21.]

J. M. Shelat,
I. D. Dua and
V. Bhargava, JJ.

Sahodara Deve v.

Government of India.

26—3—1971. C.A. No. 2246 of 1969

Cantonment Land Administration Rules (1937), Rule 27—Scope—Power to grant lease under—If mandatory or discretionary.

In rule 27 of the Cantonment Land Administration Rules, 1937, the power to grant a lease for regularisation of old grants has been given to the Military Estates Officer by using the word “may” and the power is further subject to the approval of the Central Government or such other authority as the Central Government may appoint for the purpose. In view of this language used, this rule does not envisage a mandatory direction to the Military Estates Officer to grant a lease in all cases where the question of regularisation of old grants arises. Normally, the word “may” is used to grant a discretion and not to indicate a mandatory direction. Had the intention been that the Military Estates Officer must grant a lease in all cases, the word used would have been “shall” instead of “may”. There is further the circumstance that the exercise of the power has been made subject to the approval of the Central Government or such other authority as the Central Government may appoint for that purpose. If the power had to be exercised by the Military Estates Officer in all cases, its being made subject to the approval of another authority would be meaningless. However, the refusal to exercise discretion under the rule should only be in suitable cases where sufficient reasons exist for that purpose.

V.K.

Appeal dismissed.

[S.C. N.C. 22.]

S. M. Sikri, C.J.,
G. K. Mitter,
K. S. Hegde,
A. N. Grover and
P. Jaganmohan Reddy, JJ.

State of Kerala v.

M/s. South India Corporation

(P.) Ltd.

29—3—1971. C.A. Nos. 175-178 of 1969.

Kerala General Sales Tax Act (XI of 1125) (M.E.)—Constitution of India (1950), Articles 277 and 278—Levy of sales tax Sales Tax on works contracts under Kerala General Act (XI of 1125) for the period 26th January, 1960 to 30th March, 1963—Validity—If saved by Article 277 of the Constitution.

The levy of sales tax on works contracts under the provisions of the Kerala General Sales Tax Act (XI of 1125) for the period 26th January, 1960 to 30th March, 1963 is not saved by Article 277 of the Constitution of India. Hence sales tax on works contracts effected during the said period was not leviable by the State of Kerala under the Kerala General Sales Tax Act (XI of 1125).

It is clear that Article 277 and particularly Article 278 of the Constitution were engrafted in the Constitution with the immediate object of maintaining the financial viability of the new States for such time as Parliament, thought proper. So far as the State of Kerala was concerned the need for financial assistance was met by the agreement between the President of India and the Raj Pramukh of Travancore dated 25th February, 1950 entered into under Article 278 of the Constitution. That agreement itself shows that there was liberal assistance for the first five years which was to be tapered off in another five years' time. It would not be wrong to observe that it was contemplated that after ten years the State of Kerala would be able to find its own feet and do without any special assistance from the Centre. One of the objects of the said agreement was to recoup the State of Kerala for the loss of revenue which that State used to derive from, *inter alia*, the sales tax on works contracts being a tax which was leviable under the Constitution by the Government of India alone. The agreement came to an end in 26th January, 1960.

and with it the financial assistance rendered in terms thereof. The agreement broke the continuity of the levy of sales tax on works contracts and there is nothing in Article 227 of the Constitution to resuscitate it

V K *Appeals dismissed*

[SC NC 23]

S M Sikri, C.J.,
J M Shelat
C A Vaidialingam,
A N Grover and
A N Ray, JJ

Union of India v
Sudhansu Mazumdar
CA No 974 of 1968

29-3-1971

(A) Constitution of India (1950), Article 132 (1)—Certificate under by single judge of High Court though an appeal lies to Division Bench—Propriety

The practice of a single Judge deciding the case and giving a certificate under Article 132 (1) for appeal to Supreme Court although technically correct was an improper practice. The right of the parties to file an appeal in the High Court itself against the decision of the single Judge should not be short circuited

(B) Constitution of India (1950) as amended by the Constitution (Fourth) Amendment Act (1955), Articles 12, 31 (2) and (2-A)—Constitution (Ninth Amendment) Act (1960)—Cession of territory by India as a result of treaty with Pakistan—If amounts to compulsory acquisition—If attracts Article 31 (2)—Owner of ceded property if entitled to compensation

The effect of the Constitution (Ninth Amendment) Act, 1960 by which part of the Berubari Union No 12 shall be ceded to Pakistan can by no stretch of reasoning be regarded as a transfer of the ownership or right to possession of any property of the respondents to the State within the meaning of Article 12. The Constitution (Fourth Amendment) Act 1955 makes it clear that mere deprivation of property unless it is acquisition or requisitioning within the meaning of clause (2-A) of Article 31 will not attract Article 31 (2) and no obligation to pay compensation will arise thereunder

Cession indisputably involves transference of sovereignty from one sovereign State to another. There is no transference of ownership or right to possession in the properties of the inhabitants of the territory ceded to the ceding State itself. The Constitution (Ninth Amendment) Act having been enacted in accordance with the advisory opinion of the Supreme Court there can be no impediment in the way of ceding part of Berubari Union No 12 pursuant to the Indo-Pakistan Treaty, 1958. The view of the High Court that the cession of the said territory involves transfer of the ownership and other private property rights to Pakistan through the Union of India which was outside clause (2-A) of Article 31 and was covered by clause (2) of that Article is to say the least wholly untenable and cannot be sustained. No question of acquisition within Article 31 (2) is involved in the present case and even though a good deal of hardship may result to the respondents owing to the change of sovereignty they cannot claim compensation for the simple reason that there has been no transfer of the ownership of their property to the State namely, the Union of India which would attract the applicability of Article 31 (2)

V K *Appeal allowed*

[SC NC 24]

S M Sikri, C.J.,
G K Mitter,
K S Hegde
A N Grover and
P Jagannathan Reddy, JJ

Badri Prasad v
Collector of Central Excise

30-3-1971 WP Nos 24 and 587 of
1970 and
GAs Nos 1613 and 1659
of 1970

(A) Gold (Control) Act (XLV of 1968) section 16 (4) and (10)—Requirement of making declaration by pawnbroker—If offends Article 19 (1) (f) or (g) of the Constitution of India—Compliance with the requirement if entails hardship on a pawnbroker

The requirement of making a declaration as often as a pawnbroker acquires ownership possession, custody or control of

gold under sub-section (4) of section 16 is to be read with sub-section (10) and it is enough for a pawnbroker to approach the Gold Control Officer with the full and detailed statements of his holding at the end of every month. As such it cannot be said that there is any unreasonable restriction on his holding property or pursuing his business in terms of Article 19 (1) (f) or (g) of the Constitution of India.

The supposed difficulty in the matter of compliance with section 16 of the Act as regards acquisition or transfer of gold as when made really does not exist. It would certainly have been onerous and an almost impossible task for any pawnbroker to perform if he had to furnish daily declarations in respect of his transactions during the day and to get the Gold Control Officer to make an endorsement on his declaration every day. He is at liberty to get it done only once a month and surely it would not be difficult for a person who maintains a true and faithful account of his dealings with his borrowers to prepare a schedule of all these transactions up to a certain date and secure the endorsement of the Gold Control Officer to the alteration in the declaration already authenticated by him.

(B) Gold (Control) Act (XLV of 1968), section 99—Confiscation of gold from pawnee—Absence of provision as to notice to pawnee—If affects him prejudicially.

The contention that there being no provision for notice to be given to him in case of any proceedings for confiscation the pawnee may be prejudicially affected without a hearing being given to him has no substance inasmuch as he will be the person presumed to be the owner in terms of section 99 and the gold can only be seized from his possession or custody. He can appear before the authorities and make his submission as to why no penal action should be taken against him—

(C) Gold (Control) Act (XLV of 1968), section 71—Validity—If offends Article 19 (1) (f) or (g) of the Constitution of India.

Section 71 of the Act appears to place an unreasonable restriction on the right of a person to acquire, hold and dispose of gold articles or gold ornaments. It may be applied indiscriminately and cannot therefore be upheld as saved by clauses

(5) and (6) of Article 19 of the Constitution.

(D) Gold (Control) Act (XLV of 1968), section 2 (p), Explanation—“Article” and “ornament”—Distinction.

The argument that the definition section does not make a clear distinction between an “article” and an “ornament” seems to be without foundation. The *Explanation* to section 2 (p) shows that nothing made of gold which resembles an ornament will be deemed to be an ornament unless the thing (having regard to its purity, size, weight, description or workmanship) is such as is commonly used as ornament in any State. Clearly it is a question of proof as to whether the thing passes as an article or an ornament in a particular State.

(E) Gold (Control) Act (XLV of 1968), section 58—Validity.

It is true that the usual safeguards under the Code of Criminal Procedure are not to be found in the Gold Control Act except those contained in sections 102 and 103 of the Code. But that by itself would not be enough to strike down the provision in section 58. It would not be out of place to mention that the Gold Control Act is not the only provision of law where power to search on suspicion has been conferred on an officer.

Commissioner of Commercial Taxes v. Ramakishan Shrikishan Jhaver, A.I.R. 1968 S.C. 59, followed.

(F) Gold (Control) Act (XLV of 1968), sections 6 (1) and 16 (1)—Relative scope—Applicability of section 16 (1) to pawnbrokers and money-lenders.

Section 16 (1) of the Act is not excluded in the case of money-lenders or pawnbrokers. The provision in section 6 (1) empowering the Administrator to call upon any pawnbroker to furnish a return does not do away with his obligation to file a declaration under section 16 (1). The argument that there would be duplication of declaration in respect of pawnbrokers if both are complied with, is without substance. No such duplication or difficulty will arise. Every pawnbroker will have to file his declaration under section 16 (1) and he would be obliged to make a return only

when he is called upon to do so in terms of section 6

(G) **Gold (Control) Act (XLV of 1968)**—Validity—If beyond legislative competence as trenching upon Andhra Pradesh (Andhra Area) Pawnbrokers Act (XXIII of 1943) and Andhra Pradesh (Telangana Area) Money-Lenders Act (V of 1949-F)

By the Gold Control Act Parliament only sought to control and regulate the production, manufacture use and possession of and the business in gold gold ornaments etc It did not seek to disturb or annul the provisions of the Andhra Pradesh (Andhra Area) Pawnbrokers Act (XXIII of 1943) and the Andhra Pradesh (Telangana Area) Money-Lenders Act (V of 1949-F) The provisions of the State Acts are to have full play and effect so long as the Gold Control Act is not violated Hence the argument that the Gold Control Act was beyond the legislative competence of Parliament as entrenching upon the State Acts so far as the State of Andhra Pradesh was concerned is untenable

V K.

Order accordingly

[S C N C 25]

*C A Vaidialingam and
A N Ray, JJ*

Muni Lal v

Delhi Administration

30-3-1971 Crl A No 23 of 1968

Prevention of Corruption Act (II of 1947), section 5-A—Scope—Investigation conducted in violation of section 5-A—Effect—Every one of the steps in investigation if should be conducted by specified officer

It is true that section 5-A is mandatory and not directory and an investigation conducted in violation thereof is illegal But if cognizance in fact has been taken in breach of the mandatory provisions relating to investigation the results which follow cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice An illegality committed in the course of an investigation does not affect the competence and jurisdiction of the Court for trial

Though it is clearly implicit in section 5 A that the investigation should be conducted by the officer of the appropriate rank, it does not follow that every one of the steps in the investigation has to be done by him in person or that he cannot take the assistance of his deputies

In the instant case the mere fact that some of the statements have been written down by a Sub Inspector of Police to the dictation of the Deputy Superintendent of Police will not make the investigation as one not conducted by the Deputy Superintendent of Police

V K.

Appeal dismissed

[S C N C 26]

G K Mitter,

K S Hegde and

P Jagannathan Reddy, JJ

State of Mysore v

Swamy Satyanand Saraswati

31-3-1971

C A No 496 of 1966

(A) **Grant — Construction — Grant of lands if includes sub-soil rights—Determination**

In determining the nature of rights conferred by a grant what has to be considered in each case is the purpose for which the lands are leased or an interest created therein with all the clauses which throw any light on the question as to whether the grantor purported to include his rights to the sub-soil in the grant when there was no express mention of it If the lease shows that the purpose of the grant was to allow the user of the surface only it would be wrong to presume that sub-soil rights were also covered thereby

The patta in the present case amply demonstrates that what was in contemplation of the parties at the time of the grant was the cultivation thereof or grazing cattle thereon The grantor was even careful to reserve the right to fruit-bearing trees It would be a strange construction to hold that although the grantor expressly excluded such trees from his grant he must be taken to have parted with his sub-soil rights by implication

(B) **Words and Phrases—"Mineral"—If includes granite**

It is not possible to hold otherwise than that granite is a mineral

(As to the meaning of the word "mineral" see the passage quoted in judgment from Halsbury's Laws of England, Vol. 26, 3rd Ed., Article 674, page 320 and Article 675, page 322.)

V.K.

Appeal allowed.

[S C. N.C. 27.]

*S. M. Sikri, C.J.,
G. K. Mitter,
K. S. Hegde,
A. N. Grover and
P. Jagannohan Reddy, JJ.*

*Parshottam Jadavji Jeni v.
State of Gujarat.*

1—4—1971. C.A. No. 1990 of 1970.

(A) Gujarat Industrial Development Corporation Act (XXIII of 1962)—Validity.

The principal point that the Act was beyond the legislative competence of the State Legislature no longer survives as the Supreme Court has held this Act to be valid in the case of *Ramtanu Co-operative Housing Society v. State of Maharashtra*, A I R 1970 S.C.1771.

(B) Land Acquisition Act (I of 1894), section 4—'Public purpose'—Construction of an industrial estate by the Gujarat Industrial Development Corporation is a public purpose.

(C) Land Acquisition Act (I of 1894), section 5-A—Acquisition of land for a corporation—Enquiry under section 5-A—Owner of land if entitled to cross-examine officers of the Corporation.

A report under section 5-A of the Land Acquisition Act would not be vitiated because the Collector had not granted an opportunity to the owner of the land sought to be acquired to cross-examine the officers of the Corporation on whose behalf the acquisition was made for the purpose of showing that the purpose for which the corporation sought to acquire the lands was not a public purpose. The owner cannot under the rules framed under section 55 of the Land Acquisition Act claim to cross-examine the officers of the Corporation. When the officers had not given any evidence before the Collector it would be difficult to see

what principle entitles the owner to claim this right.

V.K.

Appeal dismissed.

[S.C. N.C. 28.]

*J. M. Shelat,
I. D. Dua and
V. Bhargava, JJ.*

*Regional Provident Fund
Commissioner v.
T. S. Hariharan.*

1—4—1971. C.A. No. 1128 of 1967.
Employees' Provident Funds Act (XIX of 1952), section 1 (3) (b)—Applicability of Act—Computation of number of persons employed in an establishment for the purpose of section 1 (3) (b)—Persons employed in emergency or for short period—If should be included.

The number of persons to be considered to have been employed by an establishment for the purpose of section 1 (3) (b) of the Employees' Provident Funds Act, 1952, has to be determined by taking into account the general requirements of the establishment for its regular work which should also have a commercial nexus with its general financial capacity and stability. The employment of a few persons on account of some emergency or for a very short period necessitated by some abnormal contingency which is not a regular feature of the business of the establishment and which does not reflect its business prosperity or its financial capacity and stability from which it can reasonably be concluded that the establishment can in the normal way bear the burden of contribution towards the provident fund under the Act would not be covered by the section. The word "employment" must, therefore, be construed as employment in the regular course of business of the establishment; such employment obviously would not include employment of a few persons for a short period on account of some passing necessity or some temporary emergency beyond the control of the company. Similarly, it is difficult to impute to the Legislature an intention to exclude from the application of the Act an establishment which regularly employs for its general business the required number of persons for a major part of the year, merely because the employment of the required number does not extend to

full one year This must necessarily require determination of the question in each case on its own peculiar facts

East India Industries (Madras) v Regional Provident Fund Commissioner, (1964) 1 L LJ 441, Overruled

V K *Appeal dismissed*

[S C NC 29]
K S Hegde and
A N Grover, JJ

Bank of Bihar v State of Bihar
1-4-1971 C A No 1942 of 1966

Contract Act (IX of 1872), sections 176 and 180—Rights of pawnee *vis a vis* other creditors of the pawner—Rights cannot be defeated by lawful seizure of goods by Government

The rights of the pawnee who had parted with money in favour of the pawner on the security of the goods cannot be defeated by the goods being lawfully seized by the Government and the money being made available to other creditors of the pawner without the claim of the pawnee being fully satisfied. The pawnee has special property and a lien which is not of ordinary nature on the goods and so long as his claim is not satisfied no other creditor of the pawner has any right to take away the goods or its price. After the goods had been seized by the Government it was bound to pay the amount due to the pawnee and the balance could be made available to satisfy the claim of other creditors of the pawner. But by a mere act of lawful seizure the Government cannot deprive the pawnee of the amount which was secured by the pledge of the goods

V K *Appeal allowed*

[S C NC 30]
S M Sikri, C.J., and
P Jaganmohan Reddy, J

Delhi Administration v S N Khosla
2-4-1971 Crl A No 236 of 1966

Prevention of Corruption Act (II of 1947), section 5 (1) (b) and (d)—Scope—Public servant obtaining goods on credit from trader without intention to pay—If amounts to obtaining the goods 'without consideration' or obtaining a 'pecuniary advantage'

It cannot be said that an officer, if he obtains goods on credit even if he does not intend to pay, is obtaining a valuable thing without consideration. The case may be different if it is proved that there was an agreement with the trader that the trader would not demand the money and the officer would not pay and the bill and the reminders sent would be merely a formality

There is no doubt the words "pecuniary advantage" in section 5 (1) (d) are of wide amplitude but even so in the context of section 5 (1) (d) obtaining goods on credit cannot be held to amount to obtaining pecuniary advantage. If there is an agreement between the officer and the trader that the officer is not expected to pay for the goods then there is no doubt that this would amount to obtaining pecuniary advantage but if there is no such agreement and the officer does not pay it cannot be said that he had obtained any pecuniary advantage. He does not act in any manner different from a non-official who obtains things on credit and then refuses to pay. If it has to be held otherwise it would be impossible for any officer to go to a shop and obtain credit for if he did not pay within a reasonable time a charge could be levied against him under section 5 (1) (d)

V K *Appeal dismissed*

ration Acts and, instead the term 'arbitration agreement' had come to be defined as meaning what submission meant according to the definitions in the English Act of 1889 and Indian Arbitration Act of 1899. Notwithstanding this, the expression 'submission' was employed in section 4 (2) of the English Act of 1950 and section 3 of the Act. If the intention was to have the wider meaning the proper and correct term to use was "arbitration agreement" and logically those words would have been employed. It is more plausible that the Parliament by retaining the expression "submission" wanted to give it the meaning of an actual submission, as by then there had been firm expression of opinion in the well-known work of Russell on Arbitration and by jurists like Prof. Arthur Nassbaum in an article "Treaties on Commercial Arbitration" in vol. 56 of the Harvard Law Review, pointing to that meaning being given to 'submission.' In India the High Courts had uniformly and in unequivocal terms taken that view (See *W. Wood & Son Ltd*)¹

22. The language in the relevant article of the Convention of 1958 had also undergone a change. According to Article II, the term "agreement in writing" was to include an arbitral clause in a contract or an arbitration agreement and that term was stated to mean something by which the parties undertook to submit to arbitration all or any differences which had arisen or which might arise between them in respect of any defined legal relationship whether contractual or not concerning a 'subject-matter capable of settlement by arbitration. Thus, the term "agreement in writing" embraced an arbitral clause or an agreement simpliciter to refer to arbitration also an actual submission of the disputes to the arbitrator. It was equivalent to 'Arbitration Agreement' as defined in the Act. By not using that term and by employing the expression 'submission' in section 3 the Parliament appears to have indicated an intention to restrict the meaning of that expression to an actual submission or a complete reference.

23. Whatever way section 3 of the Act is looked at, it is difficult to reach the

conclusion that 'submission' means an agreement to refer or an arbitral clause and does not mean an actual submission or completed reference, and that the word "agreement" means a commercial contract and not an agreement to refer or an arbitral clause.

24. The next question is whether the High Court was justified in granting an interim injunction restraining the Russian Firm from proceeding with arbitration at Moscow. The position of the Russian firm is that neither it nor the Foreign Trade Arbitration Commission of the U. S. S. R. Chamber of Commerce which is seized of the arbitration proceedings is amenable to the jurisdiction of the Courts in India. The presence in India of the party sought to be enjoined is a condition pre-requisite for the grant of an injunction. Alternatively, the Indian Firm has been guilty of breach of the agreement to refer the matter to arbitration at Moscow and therefore it has disentitled itself to the exercise of the Court's discretion in its favour in the matter of granting an injunction.

25. Now, it is common ground that the point about the Russian Firm having no representative in India was not agitated before the High Court. The position taken up in the plaint was that the Russian Firm was carrying on business in the U. S. S. R. and at Madras. The controversy before the High Court appears to have been confined only to what is stated in para 5 of the counter-affidavit of the Russian Firm, namely, that in the presence of the Arbitration agreement in the contract entered into between the parties, the only proper remedy for the Indian Firm was to submit the disputes to the arbitration tribunal at Moscow.

26. The rule as stated in Halabury's Laws of England, Vol. 21, at page 407 is that with regard to foreign proceedings the Court will restrain a person within its jurisdiction from instituting or prosecuting suits in a foreign Court whenever the circumstances of the case make such an interposition necessary or proper. This jurisdiction will be exercised whenever there is vexation or oppression. In England, Courts have

1. A.I.R. 1959 Cal. 8.

been very cautious and have largely refrained from granting stay of proceedings in foreign Courts (Cheshire & Private Industrial Law, 7th Ed pages 103-110) The injunction is however, issued against a party and not a foreign Court

27 Although it is a moot point whether section 35 of the Arbitration Act, 1940, will be applicable to the present case (*Shriya Jute Baling Limited v Hindley and Company Limited*¹ it was assumed that section 35 applied to protocol arbitration) The principle embodied in that section cannot be completely ignored while considering the question of injunction According to that section no reference nor award can be rendered invalid by reason only of the commencement of legal proceedings upon the subject of the reference but when legal proceedings upon the whole of the subject-matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire all further proceedings in a pending reference shall, unless a stay of proceedings is granted under section 34, be invalid

28 If the venue of the arbitration proceedings had been in India and if the provisions of the Arbitration Act of 1940, had been applicable, the suit and the arbitration proceedings could not have been allowed to go on simultaneously and either the suit would have been stayed under section 34 or if it was not stayed, and the arbitrators were notified about the pendency of the suit, they would have had to stay the arbitration proceedings because under section 35 such proceedings would become invalid if there was identity between the subject matter of the reference and the suit In the present case when the suit is not being stayed under section 3 of the Act it would be contrary to the principle underlying section 35 not to grant an injunction restraining the Russian Firm from proceeding with the arbitration at Moscow The principle essentially is that the arbitrators should not proceed with the arbitration side by

side in rivalry or in competition as if it were a civil Court

29. Ordinarily a party which has entered into a contract of which an arbitral clause forms an integral part should not receive the assistance of the Court when it seeks to resile from it But in the present case a suit is being tried in the Courts of this country which, for the reasons already stated, cannot be stayed under section 3 of the Act in the absence of an actual submission of the disputes to the Arbitral Tribunal at Moscow prior to the institution of the suit The only proper course to follow is to restrain the Russian Firm which has gone to the Moscow Tribunal for adjudication of the disputes from getting the matter decided by the tribunal so long as the suit here is pending and has not been disposed of

30 In this context, we cannot also ignore what has been represented during the arguments The current restrictions imposed by the Government of India on the availability of foreign exchange of which judicial notice can be taken will make it virtually impossible for the Indian Firm to take its witnesses to Moscow for examination before the Arbitral Tribunal and to otherwise properly conduct the proceedings there Thus the proceedings before that tribunal are likely to be in effect *ex parte* The High Court was therefore right in exercising discretion in the matter of granting an interim injunction in favour of the Indian Firm

31 The appeals fail and are dismissed but in view of the peculiar nature of the points involved there will be no order as to costs

Ramaswami J—I regret I am unable to agree with the judgment pronounced by Grover, J

33 The first respondent had entered into a contract with the Government of India for the excavation work in the feeder canal of the Farakka Barrage Project To fulfil this contract with the Government of India and for the excavation work the first respondent required certain construction machinery such as scrapers, both towed and motorised crawlers, tractors and bulldozers The respondent No 1 agreed to purchase them from the appellant and the latter agreed to supply

¹ (1960) S.C.J. 35 (1960) 1 M.L.J. (S.C.) 1 (1960) 1 An.W.R. (S.C.) 1 (1960) 1 S.C.R. 569.

and deliver and the terms and conditions of the contract were embodied in a document dated 2nd February, 1965, signed by both the parties. In pursuance of the contract the first respondent opened a confirmed irrevocable and divisible letter of credit with the second respondent for the entire value of the equipment, that is, Rs. 66,09,372 in favour of the appellant negotiable through the Bank of Foreign Trade of the U.S.S.R., Moscow. Under the said letter of credit the second respondent was required to pay to the appellant on production of the documents particularised in the letter of credit along with the drafts. One of the conditions of the letter of credit was that 25 per cent. of the amount should be paid on the presentation of the specified documents and the balance of 75 per cent. within one year from the date of the first payment. On the strength of the contract the appellant supplied all the machinery which it undertook to supply by about the end of December, 1965. After the machinery was used for some time the first respondent complained that the machinery did not conform to the terms and conditions of the contract and consequently it had incurred and continued to incur considerable loss. Meanwhile the Indian rupee was devalued on 6th June, 1966 and in consequence the price of the machinery went up by about 57.48 per cent. The increase in the price of the machinery was in accordance with the gold clause of the contract entered into between the parties. Clause 13 of the Contract read as follows :

“The sellers and the buyers shall take all measures to settle amicably any disputes and differences which may arise out of or in connection with this contract. In case of the parties being unable to arrive at an amicable settlement, all disputes are to be submitted without application to the ordinary Courts for the settlement by Foreign Trade Arbitration Commission at the U. S. S. R. Chamber of Commerce in Moscow in accordance with the Rules of Procedure of the said Commission. The Arbitration award will be final and binding upon both parties”

Ignoring this clause the first respondent instituted a suit C.S. No. 134 of 1966

in the Madras High Court and obtained an *ex parte* injunction against the appellant and the second respondent restraining them from negotiating the letter of credit. The appellant protested that the first respondent should not have instituted a suit in violation of the arbitration clause in the contract. By a subsequent agreement dated 14th August, 1966 the appellant and the first respondent agreed to settle the matter amicably in accordance with the contract. The appellant consented to extend the payment of letter of credit by one year and the first respondent thereupon withdrew the suit in C. S. No. 134 of 1966. The respondent No. 1 is said to have accepted the devaluation drafts representing increase in the price of the machinery consequent on the devaluation of the Indian rupee in accordance with the clause in the contract. Though correspondence was going on between the parties, no settlement could be arrived at. When the time came for the payment of the balance of 75 per cent. of the letter of credit the first respondent instituted a suit C.S. No. 118 of 1967 in the Madras High Court in violation of the arbitral clause and obtained an *ex parte* injunction against the appellant from operating the letter of credit. On 5th November, 1967, the appellant instituted arbitral proceedings before the Foreign Trade Arbitration Commission of U. S. S. R. Chamber of Commerce, Moscow in accordance with clause 13 of the contract for payment of the price of the machinery. Notice was issued to the first respondent to choose its nominee to represent it in the Arbitration Commission and the date of hearing was also notified by the first respondent. But the first respondent failed to appear before the Foreign Trade Arbitration Commission. Thereafter the appellant entered appearance in C. S. No. 118 of 1967 under protest and filed an application No. 2604 of 1967, before the High Court under section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (XLV of 1961) for the stay of the suit. The first respondent also filed an application No. 106 of 1968 before the High Court praying that the appellant should be restrained from taking part in the arbitration

proceedings at Moscow. After hearing the parties Ramamurthi, J., dismissed the application of the appellant No 2604 of 1967. The learned Judge allowed the application of the first respondent and granted an injunction restraining the appellant from taking part in the arbitral proceedings at Moscow. The appellant preferred appeals O S A Nos 25 and 26 of 1968 against the orders of Ramamurthi, J. The appeals were dismissed by a Division Bench of the High Court on 16th December 1968.

34 The question involved in this case is: What is the true interpretation and effect of section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (XLV of 1961) (hereinafter referred to as the Act)? Section 3 of the Act states:

"Notwithstanding anything contained in the Arbitration Act 1940 or in the Code of Civil Procedure 1908, if any party to a submission made in pursuance of an agreement to which the Convention set forth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings apply to the Court to stay the proceedings and the Court unless satisfied that the agreement is *null and void*, *inoperative* or *incapable of being performed* or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred shall make an order staying the proceedings.

35 Section 3 refers to the Convention which is set forth in the schedule. It is an international protocol to which this country was a signatory and which was effected at New York on 10th June, 1968. Article 2 of this Convention has three clauses and reads as follows:

'1 Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit

to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2 The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams,

3 The Court of a contracting State when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is *null and void*, *inoperative* or *incapable of being performed*.

The argument of the first respondent is that section 3 of the Act can be invoked by the appellant only if it had implemented the arbitration agreement by actually submitting the dispute to the arbitrator or arbitrators prior to the institution of the suit. In the present case if there was any such reference to arbitration it was only on 4th November, 1967, that is, about three weeks after the suit had been filed in the High Court. The contrary view point was put forward by Mr Mohan Kumaramangalam on behalf of the appellant. It was said that section 3 of the Act should be interpreted in the context of the articles of the Convention set out in the schedule and it was not necessary that there should be an actual submission to arbitration before the institution of the suit. If there was an arbitral clause whether this was followed by reference to arbitration by any of the parties or not, the very existence of this clause in the commercial agreement would render stay of the suit mandatory under section 3 of the Act. The argument was that Article 2 of the Convention makes it clear that under the Convention the Court of contracting State must, when seized of such an action refer the parties to arbitration. Section 3 of the Act must be read in consonance with this obligation. Any interpretation of that section which will restrict this obligation could be justified only if the plain words necessitate such a reading.

The argument of the appellant is that the words "if any party to a submission made in pursuance of an agreement to which the convention set forth in the schedule applies" really means that the *submission* is the arbitral clause itself and the agreement is a commercial agreement which includes or embodies that clause.

36. It is necessary in this connection to refer to the legislative history of the section. The reason is that both the expression "submission" and "agreement of arbitration" have got a special meaning because of the evolution of the statute law. The English Arbitration Act of 1889 (52-532) Vic. c. 49) is the first amending and consolidating statute relating to arbitration. Section 27 of the Act defined submission as follows :

"Submission means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not."

There is no definition of "agreement" as such, and no difference is made between a mere arbitral clause that is an agreement to refer to an arbitration and an actual submission to arbitration after the disputes have arisen. A submission defined by section 27 comprehends both meanings. Section 4 of the 1889 Act provided that if any party to a submission commenced any legal proceedings against any other party to a settlement the latter may apply to the Court concerned to stay the proceedings and the Court if it is satisfied that there is no reason why the matter should not be referred in accordance with the submission may make an order staying the proceedings. In the Indian Arbitration Act of 1889 section 4 (b) defines "submission" in exactly the same terms as section 27 of the English Act of 1889, that is, a submission means a written agreement to submit present or future differences to arbitration whether an arbitrator is named or not. In the Arbitration Clauses (Protocol) Act of 1924 (14 & 15 Geo. V, c. 39) we have the phrase "submission made in pursuance of an agreement" and the phrase "submission" appears to be employed in the special statutory sense. Section 1 of this Act states :

"Staying of Court proceedings in respect of matters to be referred to

arbitration under commercial agreements—(1) Notwithstanding anything in the Arbitration Act, 1889, if any party to a submission made in pursuance of an agreement to which the said protocol applies or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a Judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, shall make an order staying the proceedings."

Clause 1 of the Schedule states :

"Each of the contracting States recognises the validity of an agreement whether relating to existing or future differences between parties. subject respectively to the jurisdiction of different contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to which jurisdiction none of the parties is subject.

Each contracting State reserves the right to limit the obligation mentioned above to contracts as commercial under its national law. Any contracting State which avails itself of this right will notify the Secretary-General of the League of Nations in order that the other contracting States may be so informed."

37. In 1930 the Arbitration (Foreign Awards) Act, 1930 (20 Geo. V, c. 15) was enacted in order to give effect to the 1927 Geneva Convention on the execution of arbitral awards. Section 8 of this Act explains the phrase "arbitration agreement" by reference to the 1924 Act.

38 The next statute in England is the Arbitration Act, 1934 (24-25 Geo V c 14) Section 8 read along with the First Schedule dealt with the powers of the Court among other matters, to pass various orders such as interim injunction, appointment of receiver, orders for preservation of properties or for protecting rights of parties, etc. Section 21 of this Act defines the expression "arbitration agreement" to mean a written agreement to submit present or future differences to arbitration whether an arbitrator is named or not. Nothing was said about the definition of "submission" in section 27 of the Act of 1889. Virtually the effect is that in the place of the word "submission" the phrase "arbitration agreement" is substituted and has a synonymous meaning.

39 In India the Arbitration Act, 1889 was repealed and replaced by the Arbitration Act of 1940. The Act dealt with only municipal or local arbitrations and so far as foreign arbitration was concerned the Indian Protocol Act of 1937 (Act VI of 1937) was enacted. Section 3 of this Act states

'Notwithstanding anything contained in the Arbitration Act 1899 or in the Code of Civil Procedure 1908, if any party to a submission made in pursuance of an agreement to which the Protocol set forth in the First Schedule as modified by the reservation subject to which it was signed by India applies, or any person claiming through or under him, commences any legal proceeding in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings apply to the Court to stay the proceedings and the Court unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred shall make an order staying the proceedings.'

The First Schedule of this Act contains articles of the 1923 Convention of which Article 1 reads as follows

"Each of the contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject."

The Second Schedule contains the 1927 Convention and Article I reads as follows

"In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement whether relating to existing or future differences (hereinafter called a submission to arbitration) covered by the Protocol on Arbitration Clauses opened at Geneva on 24th September, 1923 shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties

To obtain such recognition or enforcement it shall further be necessary

(a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto

(b) that the subject matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon,

(c) that the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure,

(d) that the award has become final in the country in which it has been made in the sense that it will not be considered

as such if it is open to opposition, appeal or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) that the recognition or enforcement of the awards not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon."

It should be noticed that Article 1 of the 1927 Convention defines an "arbitration agreement" as "a submission to arbitration".

40. The next event in the legislative history is the New York Convention adopted at the United Nations Conference in June, 1958, on International and Commercial Arbitrations. It was felt that the international Conventions upto then reached did not effectuate a speedy settlement of disputes and did not meet the requirements of international trade and commerce and disputes arising therefrom and that there should be some modification and the Convention was agreed to by almost all the countries. India accepted the same and enacted the Foreign Awards (Recognition and Enforcement) Act, 1961, to implement the Conventions so far as India was concerned. This Act of 1961 repealed the Protocol Act of 1937. With regard to section 3, the provision concerning stay of proceedings in a civil Court in violation of the arbitral clause, the language is the same as in the Protocol Act of 1937.

41. The question presented for determination is what is the true meaning and effect of the words "if any party to a submission made in pursuance of the agreement to which the said protocol applies"? in section 3 of the Act. Even at the time of the Act of 1889 the word "submission" had received a special meaning as including a mere agreement to refer to arbitration as well as an actual reference or submission to arbitration and this special meaning was given statutory recognition in the Act of 1889 by defining 'submission' in this special manner. In the Arbitration Clauses (Protocol) Act, 1924, the phrase "submission made in pursuance of the agreement" is used and the word "submission" is employed in the statutory

sense. In the Indian Arbitration Act, 1889, section 4 (b) defines submission in exactly the same terms as section 27 of the English Act of 1889. In the English Arbitration Act of 1934, the word 'agreement' is defined in section 21 (2) as a "written agreement to submit present or future differences to arbitration whether the arbitrator is named therein or not." It is clear, therefore, that the expression "arbitration agreement" and the word "submission" are synonymous and connote the same idea. In my opinion the expression "submission made in pursuance of an agreement" in section 3 of the Act must be construed in its historical setting. The word "submission" must, therefore, be interpreted to mean the arbitral clause itself and the word "agreement" as the commercial or the business agreement which includes or embodies that clause. In other words the word "submission" in the opening words of the section means an agreement to refer to arbitration and the words "the agreement to which the Convention set forth in the schedule applies" means the business agreement or contract containing the arbitral clause. It follows, therefore, that if there is an arbitral clause whether this is followed by actual reference to arbitration or not, the very existence of this clause in the commercial agreement would render the stay of the suit mandatory under section 3 of the Act.

42. The view that I have expressed is also consistent with the rule of construction that as far as practicable the municipal law must be interpreted by the Courts in conformity with international obligations which the law may seek to effectuate. It is well-settled that if the language of a section is ambiguous or is capable of more than one meaning the protocol itself becomes relevant for there is a *prima facie* presumption that Parliament does not intend to act in breach of international law, including specific treaty obligations. In the words of Diplock, L J, in *Salomon v. Commissioners of Customs and Excise*¹:

"If the terms of the legislation are clear and unambiguous they must be given effect to whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in

1. (1966) 3 A.E.R. 871 at 875-876.

Parliament extends to breaking treaties (See *Ellerman Lines Ltd v Murray*)¹ and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own Courts. If the terms of the legislation are not clear however, but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a *prima facie*, presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations, and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred. Thus in case of lack of clarity in the words used in the legislation the terms of the treaty are relevant to enable the Court to make its choice between the possible meanings of these words by applying this presumption.

Applying this principle to the present case it is manifest that Article 2 of the Convention which is contained in the Schedule to the Act imposes a duty on the Court of a contracting State when seized of such an action to refer the parties to arbitration. Section 3 of the Act must, therefore be read in consonance with this international obligation and any interpretation of section 3 which would restrict the obligation or impose a refinement not warranted by the Convention itself will not be justified.

43 This view is also borne out by the reasoning of Scarman J, in *Owners of Cargo on Board The Merak v The Merak*² in that case the plaintiff's timber was shipped abroad *The Merak* under bills of lading which stated that the voyage was "as per charter, dated 21st April, 1961" and contained a clause incorporating "all the terms, conditions, clauses including clause 30 contained in the said charter party". Clause 30 was irrelevant to a bill of lading and was inserted in mistake for the arbitration clause 32. The incorporation clause was followed by a clause giving paramount effect to the Hague Rules. In the course of the voyage the cargo was damaged and just within 12

months of the final discharge of the cargo the plaintiffs, as indorsees of the bills of lading issued a writ claiming damages from *The Merak*'s owners, who relying on the arbitration clause, moved for a stay of the proceedings under section 4 of the Arbitration Act, 1950. The plaintiffs opposed the motion on the grounds that the arbitration clause was not incorporated in the bills of lading, that the dispute did not arise out of the April charterparty or any bills of lading issued thereunder, and that the arbitration clause must in any event be rejected because it was repugnant to the paramount clause giving effect to the Hague Rules which by Article III, rule 6 provided for bringing 'suit and not for arbitration'. Scarman J holding that section 4 (2) of the Arbitration Act 1950 gave effect to the intention of the protocol on arbitration clauses to which the sub-section related, rejected the plaintiffs' contentions and, stayed the proceedings. In the course of his judgment, Scarman J, observed as follows:

"In my opinion, the sub-section must be read together with the protocol as it stands translated into the English of the First Schedule to the Act. Article I of the translated protocol provides for the recognition of the validity of an agreement whether relating to existing or future differences whereby the parties to a contract agree to submit to arbitration differences arising in connection with that contract and expressly reserves to contracting States the right to limit the obligation of recognition to contracts which are considered commercial. Article 4 provides that the tribunals of the contracting States, on being seized of a dispute regarding a contract which includes an arbitration agreement whether referring to present or future differences shall refer the dispute to arbitration. Thus the protocol is concerned with two agreements—one a contract commercial in character or giving rise to a difference relating to matters that are either commercial or otherwise capable of settlement by arbitration, between parties subject to the jurisdiction of different contracting States the other, an arbitration agreement whereby the parties to such a contract agree to submit their differences to arbitration. It is clear from the protocol that the arbit-

1 (1930) 1 All E.R. 503

2. (1965) 2 W.L.R. 250 at 262 263

tration agreement may itself be included in and simultaneous with the commercial or business contract between the parties. In my opinion section 4 (2) of the Act is intended to make the same distinction between the parties' business contract and their arbitration agreement, and no other distinction. It uses the term "submission to arbitration" to identify the protocol's agreement to submit their differences to arbitration and the term "agreement to which the protocol applies" to identify the commercial or business contract between the parties. Section 4 (2) in my opinion, applies to agreements to submit to arbitration made in pursuance of a contract to which, because of its character and the character of its parties, the protocol applies. The words "in pursuance of" merely establish the link that there must be between the agreement to submit present or future differences to arbitration and the agreement of a commercial or business character between parties of a certain class to which the protocol applies. They have in this context no temporal significance.

I see no reason for having to construe 'submission to arbitration' as an actual submission of an existing dispute to a particular arbitrator. The Act of 1950 does not say that I must. It makes nonsense of the protocol so to do. The Act of 1924 which first introduced the sub-section, was an Act to give effect to the protocol and there is respectable, though now antiquated, authority, namely, the repealed section 27 of the Act of 1889, for giving a wider meaning to 'submission' if the context so requires. The term 'submission to arbitration' is not now defined by statute, and must, in my opinion, be given a meaning appropriate to its context. While, no doubt, it is often convenient to use the term to distinguish an actual reference of a particular dispute to arbitration from an 'arbitration agreement' it would be wrong so to do in construing this particular sub-section. Accordingly, I find myself able to say that the sub-section gives effect to the intention of the protocol, the intention clearly being that when there is a business contract between parties subject to different contracting States those parties

are to be referred to arbitration if they have so agreed, whether their agreement relates to present or future differences."

The same view is expressed in Dicey and Morris, *The Conflict of Laws*, 8th edn., p. 1075 :

"Section 4 (2) of the Act imposes upon the Court a duty to stay the proceedings if a party relies on 'a submission to arbitration made in pursuance of an agreement to which the Protocol applies.' This condition is satisfied if the parties have agreed to submit present or future disputes to arbitration. The term 'submission' includes an agreement to refer. The Court is therefore under a duty to stay the proceedings although no arbitrators have been appointed, and the fact that an arbitration clause is included in the contract between the parties suffices for the application of section 4 (2). There is thus no discrepancy between the section and Article 4 of the Protocol to which it purports to give effect. According to Article 4 the Court must "refer the parties to the decision of the arbitrators" if the contract between the parties includes "an arbitration agreement whether referring to present or to future differences." The word "submission" used in section 4 (2) must be regarded as synonymous with the term 'arbitration agreement' in the Protocol and the term 'agreement to which the protocol applies' is used in the section 'to identify the commercial or business contract between the parties'. The controversy surrounding the interpretation of section 4 (2) (to which reference was made in the previous edition of this book) was left undecided in *Radio Publicity Ltd v. Compagnie Luxembourgeoise de Radio-diffusion*¹. It was however, settled by the decision of Searman, J. in *The Merak*² and the point was not disputed in the Court of Appeal."

44. If the opposite view for which respondent No. 1 contends is adopted and if it is held that the section only applies if the parties have submitted an actual dispute to arbitration the purpose of section 3 of the Act and of the ratification of the New York Protocol of 1958 by India

1. (1936) All E.R. 721 at 726.

2. (1965) 2 W.L.R. 250 at 262-263.

would have been largely frustrated. Such an interpretation would be contrary to the avowed object and intention of the Act which is 'to give effect to the Convention on the recognition and enforcement of foreign arbitral awards' done at New York on 10th June, 1958. When there is ambiguity in the language of the section it is the duty of the Court to adopt that construction which will effectuate the object of the Act and not nullify the intention of Parliament and make the provision devoid of all meaning.

45 On behalf of the first respondent it was said that there was a presumption that the Legislature in re-enacting a section of the law must be presumed to have been aware of the intervening judicial interpretation and to have given its approval to it. The classic statement of the rule is that of James, L.J., in *Ex p Campbell*¹

'Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given them.'

But the rule is better and more moderately stated by the Judicial Committee in *Webb v Outrim*² where the words of Griffith, C.J. in the Australian case *D Emden v Pedder*³ are adopted

'When a particular form of legislative enactment which has received authoritative interpretation whether by judicial decision or by a long course of practice is adopted in the framing of a later statute it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been so put upon them

Even in this qualified form however the rule has not been acknowledged without protest (see the speech of Lord Blanesburgh in *Barras v Aberdeen Steam Trawling Co*⁴. The presumption is weak and is

passed on an optimistic fiction. The rule has been criticised by Dr C. K. Allen

"The second petrifying factor is the real or supposed rule (now, however, questioned) that once a word or phrase has been given a certain judicial meaning it is doomed to bear that meaning not only in all subsequent cases but in all subsequent statutes. This is an offshoot of the somewhat optimistic assumption that the Legislature must be presumed to know the actual state of the law. Consequently, if a word has once been given a particular meaning in any case of authority, however obscure, in connection with any statute, however *recondite* the draftsman who uses that word in a later enactment is so to speak, 'affected with notice of the judicial interpretation, however remote it may be from the matter in hand. It need hardly be said that in the huge mass of our case law this assumption is a transparent fiction' (Law in the Making pages 508-509)

46 Mr Raman referred to the decisions of the Calcutta High Court and of the Bombay High Court in *Bajrang Electric Steel Co v Commissioners for Port of Calcutta*¹, *W Wood & Sons Ltd v Bengal Corporation*² and *K.E Corporation v S De Tracton*³. It was held in these cases that before the Court stays proceedings under section 3 of the Act there must be an actual submission by both the parties to arbitrators of the particular point in dispute. It was argued that in enacting section 3 Parliament was not content with a mere readiness of the parties to go to arbitration but it insisted on something more that is the actual implementation of the arbitration agreement by the parties concerned by setting up the machinery of arbitration in motion. I am unable to accept this line of reasoning. It is not said that there is a long course of practice or a series of decisions of various High Courts taking a particular view of section 3 of the Act. The decisions referred to by the respondent are not numerous and it is unsafe and unrealistic to draw the presumption that Parliament in re-enacting section 3 of the Act was aware of the

1 (1870) 2 L.R. 5 Ch 706

2 L.R. (1907) A.C. 81 89

3 (1904) 1 C.L.R. 91

4 L.R. (1933) A.C. 402

1 A.I.R. 1957 Cal. 240

2 A.I.R. 1958 Cal. 8

3 A.I.R. 1965 Bom. 114

intervening judicial interpretation and set its seal of approval upon it. In *Pa. v. Bow Road Domestic Proceedings Court*¹ Lord Denning pointed out that though the decision in *R. v. Blane*² stood for over 100 years., if it was quite an erroneous precedent, the fact that Parliament had re-enacted the provisions of the statute, did not authorise the erroneous interpretation.

47. It is, however, maintained by the respondent that the words "submission" and "agreement" must be given their natural and grammatical meaning and the word "submission" made in pursuance of an "agreement" can only mean an actual submission of the disputes to the arbitral tribunal. So the word "agreement" can have reference to and can be construed only in the sense of an arbitration agreement or arbitral clause in a commercial contract. It cannot mean a commercial contract because an arbitration agreement cannot be stated to have been made pursuant to a commercial contract. The contention is that if submission has to be taken in the sense of an arbitration agreement it would render the words "submission made in pursuance of an agreement" meaningless and unintelligible. In my opinion the argument proceeds on a fallacy. A statute should not be construed as a theorem of Euclid but the statute must be construed with some imagination of the purpose which lies behind the statute. The doctrine of literal interpretation is not always the best method for ascertaining the intention of Parliament. The better rule of interpretation is that a statute should be so construed as to prevent the mischief and advance the remedy according to the true intent of the makers of the statute. The principle was for example, applied by Lord Halsbury in *Eastman Photographic Co. v. Comptroller of Patents*³ where the question was whether the word 'solio' used as a trade mark, was an invented or a descriptive word. In examining this question Lord Halsbury said :

"Among the things which have passed into canons of construction recorded in Heydon's case we are to see what was

the law before the Act was passed, and what was the mischief or defect for which the law had not provided, what remedy Parliament appointed and the reason of the remedy."

At page 575 Lord Halsbury proceeded to state :

"Turner, L J. in *Hawkins v. Cathercole*¹ and adding his own high authority to that of the judges in *Stradling v. Morgan*² after enforcing the proposition that the intention of the Legislature must be regarded, quotes at length the judgment in that case : that the judges have collected the intention 'sometimes by considering the cause and necessity of making the Act..... sometimes foreign circumstances' (thereby meaning extraneous circumstances), so that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion. And he adds : "We have, therefore, to consider not merely the words of this Act of Parliament but the intent of the Legislature to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances so far as they can justly be considered to throw light upon the subject."

48. For the reasons expressed I hold that the appellant is entitled under section 3 of the Act for an order of stay of the proceedings in C S. No. 118 of 1967 pending in the Madras High Court on the ground that in terms of the Contract, dated 2nd February, 1965 the parties expressly agreed that all disputes arising out of the contract should be settled by arbitration by the Foreign Trade Arbitration Commission of the U S S R. Chamber of Commerce at Moscow.

49. It is not, however, possible to decide these appeals finally because the respondent has opposed the application for stay on other grounds also. Ramamurti, J., found that the arbitral clause in the contract of 2nd February, 1965, had ceased to be effective as between the parties as a

1. (1968) 2 All E.R. 89 at 91.
2. L. R. (1849) Q B 769.
3. L. R. (1898) A C. 571.

1. (1855) 6 D.M. & G 1.
2. (1584) 1 Plowd 204.

result of the agreement, dated 14th August, 1966, Ex P-32 and that it will be wholly unrealistic to hold that the moment an amicable settlement as provided in Ex P 32 proved futile, the entire contract, Ex P-4 revived. On the further aspect that admittedly section 3 itself contains an exception that the mandatory obligation to stay is not incumbent on the Court if the Court is satisfied that "the agreement is null and void, inoperative or incapable of being performed" Ramamurti, J., was apparently of the view that the alleged nullity of the contract on the basis of mutual mistake was a matter that the Court has to examine further after recording evidence and that was a ground on which proceedings cannot be stayed under section 3.

50 I consider, therefore, that CA No 1209 and 1834 of 1969 should be set down for further hearing on these points.

51 Civil Appeals Nos 1208 and 1833 of 1969 arise out of the application No 106 of 1968 filed by the first respondent for injunction to restrain the first respondent for taking further part in the arbitration proceedings in Moscow. Ramamurti, J., took the view that since the Application No 2604 of 1967 for stay of the proceedings in the pending suit CS No 118 of 1967 had been dismissed the first respondent's injunction petition should be allowed on the ground that the two forums were mutually exclusive. In the connected appeals I have taken the view that the appellant would be entitled to an order of stay of the proceedings in CS No 118 of 1967 under section 3 of Act XLV of 1961. Even assuming that section 3 of the Act is not applicable this is not a proper case in which the High Court should have issued an injunction restraining the appellant from proceeding with the arbitration. As a rule the Court has to exercise its discretion with great circumspection for it is imperative that the right of access to the tribunals of a country should not be lightly interfered with. It is not sufficient merely to show that two actions have been started for it is not *prima facie* vexatious to commence two actions about the same subject-matter one here and one abroad. [See *McHenry v Lewis*¹] The reason of this reluctance to exercise the jurisdiction is

that owing to a possible difference between the laws of the two countries the stay of one of the actions may deprive the plaintiff of some advantage which he is justified in pursuing. Thus he may have a personal remedy in one country and a remedy only against the goods in another, or a remedy against land in one State but no such remedy in another. The rule, therefore is that a plea of *lis alibi pendens* will not succeed and the Court will not order a stay of proceedings unless the defendant proves vexatious in point of fact. He must show that the continued prosecution of both actions is oppressive or embarrassing an onus which he will find it difficult to discharge if the plaintiff can indicate some material advantage that is likely to result from each separate action. Each case, therefore depends upon the setting of its own facts and circumstances. In the facts of the present case I am of opinion that no case for injunction has been made out and the order of Ramamurti, J. dated 12th April 1968 allowing the application of respondent No 106 of 1968 should be set aside. I would accordingly allow the Appeals Nos 1208 of 1969 and 1833 of 1969 with costs.

ORDER—In accordance with the opinion of the majority the appeals are dismissed. There will be no order as to costs.

V M K.

Appeals dismissed

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—*Hidayatullah, C.J., G.K. Mitter, and A.N. Ray, JJ.***Bajaj Auto Ltd., Poona** *Appellant**

v.

H.K. Firodia and another etc. Respondents.*Companies Act (I of 1956), section 111 (5-A)—Registration of transfer of shares—Directors' discretion to refuse—Interference by Court—Scope.*

If the articles of a company permit the directors to decline to register transfer of shares without stating the reasons the Court would not draw unfavourable inferences against the directors because they did not give reasons. In other words, the Court will assume that the directors acted reasonably and *bona fide* and those who allege to the contrary would have to prove and establish the same by evidence. Where, however, the directors gave reasons the Court would consider whether they were legitimate and whether the directors proceeded on a right or wrong principle. As a result of the introduction of section 111 (5-A) in the Companies Act, two consequences follow. First, if the Articles permit the directors not to disclose reasons for declining to register a transfer the statute confers power to interrogate the directors to disclose the reasons. Secondly, if the directors do not disclose reasons presumption can be drawn against the directors for non-disclosure of reasons in spite of being called upon to do so.

[Para. 14.]

Thus, where the directors have uncontrolled and absolute discretion in regard to declining registration of transfer of shares, the Court will consider if the reasons are legitimate or the directors have acted on a wrong principle or from corrupt motive. If the Court found that the directors gave reasons which were legitimate, the Court would not overrule that decision merely on the ground that

the Court would not have come to the same conclusion. [Para. 22.]

It has been well settled that the directors are not entitled to look behind the register for any purpose. They do not take notice of trust. Similarly they cannot say that the transferee is the nominee of some one whom they consider objectionable. The accent is always on personal objections to the transferee. [Para. 21.]

Special resolutions are for limited purposes and are not matters of daily routine administration. The mere apprehension that special resolutions will not be passed is not a legitimate reason for declining registration of transfer of shares.

[Para. 30.]

The discretion of the directors is to be tested as the opinion of fair and sensible men in the interest of the company. In the present case the directors failed to exercise their discretion properly by refusing to register transfer of shares on wrong principles and for corrupt and oblique motives. [Para. 34.]

Appeals by Special Leave from the Orders dated the 14th March, 1970 of the Company Law Board, Department of Company Affairs, Ministry of Industrial Development, Internal Trade and Company Affairs, New Delhi in Appeals Nos. 4 to 7 of 1969 etc.

C.K. Daphtary, A.K. Sen and Dr. L.M. Shinghvi, Senior Advocates (*S. Swarup and B. Datta*, Advocates and *J.B. Dadachanji, O.C. Mathur and Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with them), for Appellant (In all the Appeals).

F.S. Nariman, A.B. Diwan, K.J. Merchant and I.N. Shroff, Advocates, for Respondent No. 1 (In all the Appeals).

The Judgement of the Court was delivered by

Ray, J.—These appeals are by Special Leave against the order dated 14th March, 1970 made by the Company Law Board, Department of Company Affairs, Ministry of Industrial Development, Internal Trade and Company, New Delhi under section 111 (3) of the Companies Act, 1956 directing the appellant company to register transfer of 3643 shares

*C.As. Nos. 546, 547 and 692 to 1031 of 1970.
4th September, 1970.

forming the subject-matter of these appeals

2 The respondents in these appeals are Jaya Hind Industries Ltd, N K Firodia and other persons who will be referred to as the Firodia group. The appellant will be referred to as the Bajaj group

3 The Firodia group lodged in different lots 3643 shares of the appellant for being transferred to different names. Jaya Hind Industries Private Ltd, applied for transfer of 1500 shares in their names. Firodia applied for transfer of 30 shares in his name. The other transfers were in the names of associates, nominees and friends of the Firodia group. The Board of the appellant refused to register transfer of the said shares at the Board meetings held on 23rd May, 1968 in respect of 2532 shares and on 24th June, 1968 in respect of 1,111 shares. The appellant communicated the said refusal to transfer the shares in the month of June, 1968

4 Thereafter in the month of August, 1968, 338 appeals were filed before the Company Law Board in respect of refusal of the appellant to transfer 3643 shares. The Company Law Board by its letter dated 16th January 1969 asked the appellant to disclose the reasons for refusal to register of shares. The appellant company gave three reasons for refusal to register transfer of the said 3643 shares. First, that Jaya Hind Industries Private Ltd, was a beneficiary to the extent of 1/4 share in the Managing Agency remuneration receivable by Jammalal Sons Private Ltd, from Bajaj Auto Ltd and N K Firodia. The appellant applied to the Company Law Board against the extension of the Managing Agency of Jammalal Sons Private Ltd. The company further said that N K Firodia, according to the appellant company was their representative and when N K Firodia acted in such a treacherous fashion and against the interest of the company and behind the back of the Board of Directors it became evident that Firodia's design was to create mischief. Secondly, the transfer of shares received from Jaya Hind Industries Private Ltd, was part of the design to acquire interest in the company which was likely to result in a threat to the

smooth functioning of the management of the company, and to vote down the passing of a special resolution required for the management of the company and, therefore, transfer should not be permitted. Thirdly, the purchase of shares by Jaya Hind Industries Private Ltd, was not with a view to *bona fide* investment but with a *mala fide* purpose and evil design. It was said that the issued share capital of the company was 1,04,250 shares of Rs 100 each. Firodia group was holding 21,500 shares. Transferring further shares to the names of Firodia group would obstruct the business of the appellant company in the passing of special resolution which was required in the day to day business of the company. It was also said that from the investment point of view with a dividend of Rs 10 per share on a paid up share of Rs 100 the purchase price paid by Firodia group was artificial and could only be with a view to try to take control and/or obstruct the business and smooth working of the company and to injure the existing management. The appellant company concluded by saying that the Board of Directors came to the conclusion that it was in the interest of the company to refuse the said transfers.

5 In order to appreciate whether the Directors used the discretion in proper exercise of their fiduciary power and the reasons were *bona fide* and legitimate in the interest of the company as a whole, it is necessary to refer to certain features of the case.

6 In the year 1947 a joint venture business was entered into between Jaya Hind Industries Ltd and Bachhraj Trading Corporation Ltd. In the month of March 1950, Bachhraj Trading Corporation suffered heavy losses and the joint venture was transferred to Bajaj Factories Ltd, with the consent of Jaya Hind Industries Ltd.

7 In the year 1952 N K Firodia became a Director of Bachhraj Trading Corporation Ltd. In the month of April 1954 Jaya Hind Industries Ltd acquired 1800 shares of the face value of Rs 1,80,000 of Bachhraj Trading Corporation Ltd, at Rs 36-8-0 per share which together with 50 shares held by N K Firodia equalled 3/8th of the share capital. In the month

of May, 1954, Bachhraj Trading Corporation Ltd., again took over the business of the joint venture from Bajaj Factories Ltd. In the year 1955 N.K. Firodia as a Director of Bachhraj Trading Corporation Ltd., applied to the Central Government for the manufacturing licence of scooters, auto rickshaws and tempo three-wheeler vehicles. In the year 1957 Bachhraj Trading Corporation Ltd., was granted the manufacturing licence of tempo three-wheelers. In 1958 Bajaj Tempo Private Ltd., was formed to manufacture tempo three-wheeler vehicles and N.K. Firodia was appointed the Managing Director of the same. In the year 1959 Bachhraj Trading Corporation Ltd. was granted licence to manufacture scooters and auto rickshaws. In the year 1960 the name of Bachhraj Trading Corporation Ltd., was changed to Bajaj Auto Private Ltd. Shares of Bajaj Auto Private Ltd. were offered to shareholders of Bachhraj Trading Corporation in proportion to their shareholding.

8. Between the years 1954 and 1960 Jaya Hind Industries Private Ltd., of the Firodia group had provided substantial funds amounting to Rs. 4,36,000 to the appellant company in its former name. In the year 1960 there was a Managing Agency agreement between the appellant company and Jamnalal Sons Private Ltd. a period of five years. In 1960 when the appellant was converted into a public limited company and Firodia was appointed as its Chief Executive, the respondent company of the Firodia group by themselves, their shareholders and friends subscribed for $37\frac{1}{2}$ per cent. of the shares offered to the then existing shareholders of the appellant company. An agreement was entered into between Jamnalal Sons Private Ltd. Managing Agents of the appellant-company and the respondent Jaya Hind Industries Private Ltd., on 15th August, 1960, by which the Managing Agents agreed to pay 25 per cent of the remuneration of the Managing Agency to the respondent-company in consideration of services rendered to the appellant-company. Gradually, the appellant-company grew into a prosperous and very well developed automobile unit. Land was acquired, buildings were constructed and machinery and equipment worth more than a crore of rupees was purchased and

installed. The manufacturing activity of the appellant-company made good progress and 90 per cent. of the components of scooters and auto rickshaws were capable of being manufactured indigenously.

9. In the month of June, 1965 the appellant-company applied to the Central Government for re-appointment of Jamnalal Sons Private Ltd. as Managing Agents of the appellant-company for a period of 10 years. The Central Government on 11th August, 1965, sanctioned the said re-appointment of Managing Agents for the period commencing 16th August, 1965 and ending 31st March, 1968, viz., for an approximate period of three years. The appellant company entered into an agreement with the Managing Agents on similar terms.

10. In the month of August, 1967 Kamalanayan Bajaj of the Bajaj group proposed at the Board meeting of the appellant that an application should be made to extend the term of the Managing Agency. Firodia of the respondent-company group opposed any such extension. In the month of December, 1967 the appellant applied to the Company Law Board for extension of the term of Managing Agency of Jamnalal Sons Private Ltd. for a period of 7 years so that the Managing Agents would have a term of 10 years commencing 16th August, 1965. The letter of the appellant-company was signed by the Secretary. In the month of March, 1968, Firodia came to know about the said letter and wrote to the Chairman of the Company Law Board that there was neither any resolution of the general meeting of the company for such extension nor any publication of such appointment. Firodia said that the appellant company contravened, in particular, the provisions contained in sections 326 and 640-B of the Companies Act, 1956. The Company Law Board, however, approved of the extension of the Managing Agency for a period of two years from 31st March, 1970.

11. The appellant company was converted into a public limited company in 1960 and the share capital was increased from Rs. 9,90,000 to Rs. 70,00,000. In the months of February and March,

1967 the capital of the appellant-company was increased by issue of right shares. By the end of February, 1968 out of the issued share capital of 1,04,250 shares the Bajaj group held about 28,600 shares the Firodia group 23,400 shares and the general public about 52,250 shares. The Bajaj group however alleged that in February, 1968 they held 31,500 shares and the Firodia group had 21,735 shares. In the month of March, 1968 the Bajaj group bought about 16,230 shares up to the maximum value of Rs 411 per share. It may be mentioned here that out of the said 16,230 shares the Bajaj group bought about 4,000 shares from the Life Insurance Corporation Ltd. and the Unit Trust of India. The Bajaj group obtained transfer of the said 16,230 shares in their names. The Firodia group, on the other hand, from the month of April 1968 onwards lodged in different lots 3,643 shares of the appellant company for being transferred to their names. The Board declined to register any transfer in respect of the said 3,643 shares.

of the shares and assisted in procuring subscription to the shares offered to the public. Jammalal Sons Private Ltd., the Managing Agents of the appellant, agreed to pay 25 per cent. of their remuneration of the Managing Agency to the respondent-company of the Firodia group in consideration of the services rendered.

13 Article 52 of the appellant-company provided that the Directors might at their absolute and uncontrolled discretion decline to register any transfer of shares. Discretion does not mean a bare affirmation or negation of a proposal. Discretion implies just and proper consideration of the proposal in the facts and circumstances of the case. In the exercise of that discretion the Directors will act for the paramount interest of the company and for the general interest of the shareholders because the Directors are in a fiduciary position both towards the company and towards every shareholder. The Directors are therefore required to act *bona fide* and not arbitrarily and not for any collateral motive.

12 It is also necessary to know about the antecedents and activities of Firodia in relation to the affairs of the appellant company. When the joint venture was started in the year 1946 between Bachhraj Trading Corporation Ltd. and the respondent-company Firodia was in actual charge of the joint venture. In the year 1950, Firodia went to Germany and obtained representation from Vidal and Sohn Tempo Works Hamburg, Germany in connection with the manufacture of tempo three wheeler vehicles. In 1952 Firodia became a Director of Bachhraj Trading Corporation Ltd. Firodia thereafter submitted a scheme for the manufacture of scooters and auto rickshaws and obtained a licence for Bachhraj Trading Corporation Ltd. in that behalf. The Firodia group acquired shares of the face value of Rs 1,80,000 in Bachhraj Trading Corporation in the year 1954 and helped its rehabilitation after it suffered heavy losses. The Firodia group provided funds to the extent of Rs 4,36,000 to the Bajaj group during the years 1954 and 1960. When the appellant-company became a public limited company in the year 1960 the Firodia group subscribed for 37½ per cent

14 If the Articles permit the Directors to decline to register transfer of shares without stating the reasons the Court would not draw unfavourable inferences against the Directors because they did not give reasons. In other words, the Court will assume that the Directors acted reasonably and *bona fide* and those who alleged to the contrary would have to prove and establish the same by evidence. Where however the Directors gave reasons the Court would consider whether they were legitimate and whether the Directors proceeded on a right or wrong principle. As a result of the introduction of section 111 (5A) in the Companies Act, 1956 two consequences follow. First, if the Articles permit the Directors not to disclose reasons for declining to register a transfer the statute confers power to interrogate the Directors and disclose the reasons. Secondly, if the Directors do not disclose reasons presumption can be drawn against the Directors for non-disclosure of reasons in spite of being called upon to do so.

15 In the present appeals the reasons of the Directors have to be tested from three points of view. First, whether

the Directors acted in the interest of the company; secondly, whether they acted on a wrong principle; and, thirdly, whether they acted with an oblique motive or for a collateral purpose. This Court in *M/s. Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunjunwala and others*¹, said that "the discretion of the Directors would be nullified if it were established that the Directors acted oppressively, capriciously or corruptly or in some other way *mala-fide*." The decision in *Harinagar Sugar Mills Ltd.*¹, related to a case under the Companies Act, 1956 prior to the introduction of section 111 (5-A). That is why if the Directors under the Articles were not to disclose reasons it was said that the Court would presume where the Directors refused to register the transfer of shares that their power of absolute discretion was exercised *bona fide* unless corrupt or *mala fide* motives were affirmatively pleaded and proved. It would be for the aggrieved transferor to show that the refusal to register transfer was exercised *mala fide* and not in the interest of the company and thereby the presumption of *bona fide* would be displaced.

16. The words '*bona fide* and for the benefit of the company as a whole' have been considered in some English decisions. Reference may be made to the decision in *Greenhalgh v. Arderne Cinemas Ltd.*² where Evershed, M.R. said that if a resolution had the effect "to discriminate between the majority shareholders and minority shareholders so as to give the former advantage of which the latter were deprived," the resolution could be attacked on grounds of elements of dishonesty or impropriety. The acts of the Directors would have to be scrutinised as to whether they were the honest opinion of the Directors acting for the company as a whole.

17. Mellish, L.J., in *Ex-parte Pennay*³, said that the Directors would have no right to force a particular shareholder to continue as a shareholder and not to allow him to transfer shares at all because that would be an abuse of their power.

Lord Cozens-Hardy, M.R. in *Re. Bede Steam Shipping Company Ltd.*¹, said that the personal objections to a transferee were where the transferee would be quarrelsome person or he would be an unreasonable person or he would be acting in the interest of a rival company. The Directors there had power to refuse to register transfer of shares if "in their opinion it is contrary to the interest of the company that the proposed transferee should be a member thereof." In that case there were disputes between the elder brothers who were Directors. One of the elder brothers sold his two shares to a clerk of his and another share to his house-keeper. The other Director said that the company was really a family concern and therefore the shares should not be transferred singly or in small lots to outside persons having no interest in or knowledge, of shipping.

18. In *Bade Steam Shipping Co.*¹, the power of the Directors was to refuse to register the transfer of share to any person of whom the Directors did not approve as transferee. The Directors in declining to register the transfer gave two reasons. First, that there would be increase in expenditure if the body of shareholders who numerically increased and secondly the individuals who were neither related to the founders family nor connected in business with the company would become members by the proposed transfer. Neither of these reasons was held to touch the fitness of the transferees. The real power of the Directors in refusing registration of transfer was on the ground of personal objections to the transferees. The apprehension on the part of the Directors in the increase in the number of shareholders was therefore found to be an abuse of power. It was found that the Directors in refusing registration to transfer thought of the proposed transferees as mere nominees who could adopt the attitude of the transferor who had disagreed with the Directors of the company. The Directors did not look at the relevant circumstances in which they were placed, namely their status, their occupation, and, in particular, whether the transferees were interested in any private business competing with the company.

1. (1962) 2 S.C.R. 339 : (1963) 1 S.C.J. 471.

2. (1950) 2 A.E.R. 1120.

3. (1872) L.R. 8 Ch. App. 446.

1. L.R. (1917) Ch. 123.

19 Reference may be made to an old decision in *Re Bell Brothers Ltd*¹, as an illustration of the power of the Directors to refuse registration of transfer. The relevant Article in the case of *Bell Brothers*¹, conferred discretionary power on the Directors to refuse registration of transfer of shares on the ground that the Directors did not approve of the transferee. Chitty, J, said in relation to the Directors' power that the Directors must act in good faith and in the interest of the company and with due regard to the right of a shareholder to transfer his shares and they must fairly consider the question of the transferee's fitness at a Board meeting. The Directors in that case were not required to disclose reasons. These propositions can be extracted from that case. First, where the Directors do not assign any reason because of the Articles it is competent for those who seek to have the transfer registered to show affirmatively by proper evidence that the Directors had not duly exercised their power. Secondly, if reasons are given by the Directors and the reasons are legitimate the Court will not overrule the Directors' decision merely because the Court itself would not have come to the same conclusion. Thirdly, if the reasons are not legitimate, the Court would hold that the power had not been duly exercised. An example would be where the Directors said that they rejected the transfer because the transferor's object was to increase the voting power in respect of his shares by splitting them among his nominees.

20 In the case of *Bell Brothers*¹, two Bell brothers John and Lowthuan and the members of their families were shareholders in Bell brothers. John died leaving a will and the beneficiaries under the will were his widow and children. The will provided for the widow an annuity. The will contained a general trust for conversion. John's shares were sold to provide a fund to meet the annuity. Hodgson purchased those shares. The Directors were Lowthuan, his son Hugh and his son-in-law. Hugh was an executor trustee under the will of John and as such was one of the transferors of the shares of

John. The shares of the testator were in the names of Hugh, the nephew and Charles, the son of the testator as executor trustees. The shares being registered in two names, Hugh as the first on the register had the right to vote. Hugh had on the one hand expressed the opinion to sell the shares in the true interest of the beneficiaries and on the other hand as a Director opposed the sale to Hodgson on the ground that the shares should be held by the members of the Bell family. The Directors did not allow registration either in the name of Hodgson or his nominees.

21 It has been well settled since the decision in *Pender v Lushington*¹, that the Directors are not entitled to look behind the register for any purpose. They do not take notice of trust. Similarly, they cannot say that the transferee is the nominee of some one whom they consider objectionable. The accent is always on personal objections to the transferee. The solicitors of the Directors in the case of *Bell Brothers*², gave the real reason for refusal of registration that Hodgson was holder of shares in a rival company. Chitty, J said that the Directors carefully abstained from stating that their personal objection to Hodgson was and put forward their solicitors to assign the reason for it. The Directors who had an opportunity of exercising their power attempted to exercise it upon a wrong principle and therefore their power was gone. It is quite likely that if the Directors had given evidence of their real reason the Court might have accepted it as legitimate. The decision in the case of *Bell Brothers*², illustrates that where the Directors have the power to refuse registration of the transfer of shares, their exercise of power on a wrong principle will vitiate the exercise of the power.

22 It follows that where the Directors have uncontrolled and absolute discretion in regard to declining registration of transfer of shares, the Court will consider if the reasons are legitimate or

the Directors have acted on a wrong principle or from corrupt motive. If the Court found that the Directors gave reasons which were legitimate, the Court would not overrule that decision merely on the ground that the Court would not have come to the same conclusion. Reference may be made to the decision in *Balwant Transport Co. Ltd., Amraoti v. Y. N. Deshpande*¹, which is a Bench decision of the Nagpur High Court. Sapate was a shareholder in the company and owned 31 shares. One of his shares was sold by public auction and was purchased by Deshpande. Deshpande applied for registration. The Article in the Nagpur case conferred absolute and uncontrolled discretion on the Directors to refuse to register transfer where in the opinion of the Directors it was not in the interest of the company to admit the proposed transferee to membership. The evidence in that case was that Deshpande was the lawyer of Sapate. Sapate was quarrelling with the company. Sapate also joined a rival concern. The Directors' decision in those surrounding circumstances was found to be a legitimate exercise of the power of the Directors in the interest of the company.

23. The decision in *Re. Smith and Fawcett Ltd.*² indicates the extent to which the Court upholds the exercise of absolute and uncontrolled discretion of the Directors to refuse to register any transfer of shares. In that case there were two Directors who held the shares in equal members. One died. The other Director refused to register the transfer of shares in the names of the executors of the deceased Director except in respect of a part of the holding and upon the condition that the balance be transferred to the surviving Director. It was found to be a justifiable act of the Director in the interest of the company.

24. In the old Bombay decision in *Kaikhosro Municherji Heera 'Ma' Neck and others v. Coorla Spinning and Weaving Company and others*³, the Board of Directors might decline to register any transfer of shares, unless the transferees were approved by the Board. A shareholder became

insolvent. His share vested in the Official Assignee. The Official Assignee sold the shares. The purchaser applied for registration. The Directors declined to approve of the transferees unless the transferees would pledge themselves not to oppose a certain change in the mode of remunerating the Agents of the company, which the Directors desired to effect, and which they believed would be very advantageous to the company. It may be mentioned here that the purchaser of the shares required the Official Assignee to register transfer in the names of the two nominees who were already the holders of shares in the company. The company however, did not take any objection to the nominees in their personal capacity. The Directors acted on wrong principle and in abuse of power in insisting on obtaining a pledge from the transferees not to oppose change in remuneration of the Managing Agents.

25. A Bench decision of the Allahabad High Court in *The Muir Mills Company Ltd. of Cawnpore v. T. H. Condon and another*¹ related to the absolute power of the Directors to refuse registration of transfer of shares on personal objections to the transferee. The Muir Mills in that case disallowed the transfers on the ground that the transferees were subordinates of McRobert, the Managing Director of Cawnpore Mills. There was personal animosity between Johnson, the Managing Director of the Muir Mills and McRobert. The Directors of the Muir Mills came to a conclusion that McRobert should not add to his voting power and 'harass the management.' It was found to be abuse of fiduciary discretionary power of the Directors when they wanted to safeguard the Directors personal interest against Mc Robert.

26. The first reason of the appellant company for the refusal of registration of transfer of the shares was that Firodia acted in a treacherous fashion against the interest of the company and behind the back of the Board of Directors. The evidence is that the Managing Agents of the Bajaj group in the year 1965 failed to obtain from the Government approval of an extension of term for 10 years.

1. A.I.R. 1950 Nag. 20.

2. L.R. (1942) Ch. 304.

3. (1892) I.L.R. 16 Bom. 80.

1. (1900) I.L.R. 22 All. 410.

The Government sanctioned the term for about three years which was to expire on 31st March, 1968. In the month of August 1967 when Kamalnayan Bajaj of the Bajaj group proposed an extension of the term of the Managing Agents Firodia represented to the Board that Firodia was opposed to the same. No application for extension of the term of Managing Agents was made at that time. The appellant however behind the back of Firodia wrote to the Company Law Board in the month of December 1967 and though Firodia was the Chief Executive the letter was signed by the Secretary and kept concealed from Firodia. Firodia came to know of the letter, in the month of March 1968 and he wrote to the Company Law Board that the company had made "false statement" in the application for extension of the term, namely, that the appellant company gave a wrong impression that it had received permission to increase its production to 60 000 scooters per year whereas in fact no such permission had been granted. Firodia also pointed out that the appellant suggested that its progress was because of the Bajaj group and made no reference to Firodia who was the Chief Executive of the appellant.

27 In 1965 the appellant asked for appointment of the Managing Agents for ten years. The Company Law Board approved of the appointment upto 31st March 1968. It is true that there was a resolution of the appellant company in the year 1965 for the appointment of the Managing Agent for a period of ten years. That resolution of 1965 after the appointment of the Managing Agents for a term of less than three years and in particular, after an agreement had been entered into between the appellant company on the one hand and the Managing Agents on the other in that behalf, was exhausted, and spent its force and could not be said to have either a life of its own for 10 years or to spring into action in the year 1968 for a revival of the resolution to enable the appellant company to ask for appointment of Managing Agents for a period of seven years on the basis of any such resolution. Firodia rightly protested against the absence of any resolution of the shareholders and also against the absence of

any publication of proposal for appointment of Managing Agents for seven years. Firodia furthermore rightly cavilled against the total obscuration of his name or of any reference to his activities in relation to the affairs of the company and the contrary suggestion in the letter that the prosperity of the appellant company was an account of Kamalnayan Bajaj. This aspect is important to show that the allegations of Firodia were against the Managing Agents and further that Firodia was acting in the larger interest of the company whereas the Managing Agents were actuated by their personal motives of preservation and aggrandisement of their power. The letter written by the appellant to the Company Law Board was not circulated to the shareholders. Firodia came to know about the letter and that is why he informed the Company Law Board of the state of affairs.

28 On this evidence it is apparent that Firodia wrote to the Company Law Board in the larger interest of the company. Firodia's allegations were against the Managing Agents. Firodia was justified in opposing reappointment of the Managing Agents without a specific resolution of the shareholders of the company and without a public notice to the shareholders to represent their views in the matter. The Bajaj group acted behind the back of Firodia and wanted to steal a march. The real motive of the Bajaj group was revealed first by imposing restrictions in the month of March, 1968 on the powers of Firodia as Chief Executive of the appellant company and secondly by the resolution in the month of May, 1968, to terminate the services of Firodia as Chief Executive. The refusal to register the transfers was at the meetings of the Board held in the months of May and June, 1968.

29 The Directors had a hostile feeling against Firodia and they had the dominant desire to keep Firodia out of the company. The Directors did not act in the interest of the company and their discretion was tainted by unfair conduct and unjustifiable attitude against Firodia.

30 The second reason given by the appellant company was that the Firodia group acquired the shares with a design

of acquiring interest in the company which was likely to result in a threat to the smooth functioning of the management of the company and to vote down the passing of the special resolution. There are well-recognised safeguards as to notice and content for passing special resolution. Special resolutions are for limited purposes and are not matters of daily occurrence or of daily routine administration. The mere apprehension that special resolutions will not be passed is not a legitimate reason. The shareholders will bestow their attention on matters forming the subject-matter of resolution. Passing of special resolutions will depend upon the mandate of the shareholders. It is manifest that the reason given by the Directors was a camouflage to cover their collateral and corrupt motive of preserving the hegemony of the Bajaj group. The motive is corrupt because the Bajaj group acted for their personal interest and not in the *bona fide* general interest of the company.

31. The third reason given by the appellant-company was that the shares were being acquired by the Firodia group not with a view of *bona fide* investment but with a *mala fide* purpose and evil design of obstructing the business of the appellant-company. Acquisition or transfer of shares under the Articles of the present case does not suffer from any restrictive impediment like pre-emption or personal objections to the transferees. There is no evidence that the transferees belonged to a rival concern. Equally, there is no evidence that the Firodia group ever obstructed in the management of the company. On the contrary, the Firodia group advanced large sums of money. Firodia was largely responsible for the gradual growth of the appellant-company and for the prosperity of the company. It was therefore an abuse of the fiduciary power of the Directors to refuse to register transfer of shares.

32. The Bajaj group obtained transfer of 16,230 shares in their favour in the month of March, 1968. The Bajaj group purchased shares in the market at a maximum value of Rs. 411 per share. The holding of the Bajaj group prior to

the acquisition of the said 16,230 shares was 28,600 shares or according to the Bajaj group 31,500 shares. The Firodia group on the other hand prior to the proposed transfer had 23,400 shares or 21,735 shares according to the Bajaj group. The general public held 52,250 shares. This was the position in the month of February, 1968. The Bajaj group by the acquisition of 16,230 shares would have a numerical strength of 44,830 shares whereas the Firodia group would be having 26,863 shares if the proposed transfer were allowed by the Directors. The Bajaj group paid Rs. 411 per share. The Firodia group paid roughly about Rs. 200 per share. Firodia was not on the Board of Directors of the appellant-company. The Bajaj group and their friends were the Directors. In the year 1967 the Firodia group lodged 4,243 shares for transfer in their names and the transfers were registered. Again, in the month of February, 1968 when the Firodia group lodged 68 shares with the appellant-company for transfer, the appellant-company accepted the said transfer. It is, therefore, revealed that after the appellant came to know that Firodia wrote to the Company Law Board in the month of March, 1968, that the Directors of the appellant-company developed antipathy against Firodia. The refusal to register the shares was a sequel to the termination of the appointment of Firodia as Chief Executive and it is manifest that the Directors acted for collateral reasons and in their own interest.

33. Counsel on behalf of the appellant contended that of the seven Directors only Kamalnayan Bajaj belonged to the Bajaj family and each Director was an independent industrialist and could not be described to be of Bajaj group. Neither the status and wealth of the Directors nor their lack of relationship with the Bajaj family could be decisive as to whether they exercised their discretion on correct principle or without any corrupt motive. The Firodia group alleged that Kamalnayan Bajaj was an arbitrator in the family dispute of Ramnath A. Podar and that Shriyans Prasad Jain was a close associate of Kamalnayan Bajaj. Irrespective of these allegations, we have already indicated that the Directors failed to exercise their discretion properly by

refusing to register transfer of shares on wrong principles and for corrupt and oblique motives

34 The discretion of the Directors is to be tested as the opinion of fair and sensible men in the interest of the company. In the present case, the Directors did not act *bona fide* nor did they act in the general interest of the company. On the contrary, they acted upon a wrong principle and for the oblique motive of squeezing out Firodia. The inescapable conclusion is that the Directors acted arbitrarily and unjustifiably.

35 For these reasons we are of opinion that the appeals fail. They are dismissed with costs. The respondents will be allowed one set of hearing fees.

V K ————— Appeals dismissed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — J C Shah and A N Grover, JJ

The Nagar Panchayat, Una Appellant*

v

The Una Taluka Sahakar Kharid Vechan Sangh Ltd Respondent

Gujarat Panchayat Act (VI of 1962), section 307—Saurashtra Terminal Tax and Octroi Ordinance (1949)—Nagar Panchayat constituted under Gujarat Panchayat Act in place of former municipality constituted under its predecessor Act—Right to collect octroi previously vested in municipality—If enures to the benefit of Nagar Panchayat

Section 307 of the Gujarat Panchayat Act leaves no room for doubt that wherever a Nagar Panchayat was constituted in place of the Municipality, the Municipality disappeared and all its funds including the right to realise taxes etc., vested in the Nagar Panchayat. In other words it was the Nagar Panchayat which was to function as the local body in the area previously constituted as a municipality. Clause (k) of section 307 clearly saved all laws or rules which were applica-

ble to the local area which formed a municipality and they were to continue to apply and to remain in force in the area for which the Nagar Panchayat came to be constituted. By no stretch of reasoning could it be said that the Saurashtra Terminal Tax and Octroi Ordinance, 1949, did not become applicable to the cities and towns specified in Schedule I thereto which came to be constituted as Gram or Nagars under the Gujarat Panchayat Act.

[Para 6]

The object underlying clause (c) of section 307 was to vest in the Nagar Panchayat the entire municipal fund including the arrears of taxes and fees as also the powers and rights relating thereto which previously vested in the municipality. The octroi which was being collected under the Saurashtra Ordinance clearly fell within the ambit of clause (c). The power and the right to collect octroi therefore has passed to the Nagar Panchayat and it was fully entitled to exercise it. [Para 7]

Appeal from the Judgment and Order dated the 18th February, 1970 of the Gujarat High Court in Special Civil Application No 387 of 1968.

D V Patel, Senior Advocate (Vineet Kumar, Advocate, with him), for Appellant

I N Shroff, Advocate, for Respondent

The Judgment of the Court was delivered by

Grover, J.—This appeal by certificate arises out of a writ petition filed by the respondent which is a Society registered under the Bombay Co-operative Societies Act, 1925 challenging the collection of octroi by the appellant which is the Una Nagar Panchayat.

2 The appellant is a local body constituted under the Gujarat Panchayat Act, 1961, hereinafter called the 'Act', which came into force with effect from 1st April, 1963. Prior to its enactment the Bombay Municipal Act, 1901, as applied to Saurashtra, was in force in that region of the present State of Gujarat. Under its provisions Una Municipality was constituted. It was collecting octroi on commodities which were imported into the municipal limits of Una under the

Saurashtra Terminal Tax and Octroi Ordinance 1949, Under section 3 of that Ordinance, the Government could impose the tax mentioned thereunder in the cities and towns specified or included later in Schedule I. One of these taxes was a terminal tax on goods imported into or exported from the terminal tax limits. Octroi as defined by section 2 (2) included a terminal tax. Section 4 gave the power to the Government to make rules by notification for the purpose of carrying out the purposes of the Ordinance. Rules were framed under section 4 in the Gujarati language. It was provided therein that the collection of octroi and terminal tax would be done through the

Sudhrai (સુધ્રાઈ) of the area entered in the schedule to the ordinance. It is apparent that under the Ordinance it was the State Government which imposed the octroi or the terminal tax in the cities and towns specified in the Schedule and the Sudhrai was only an agency for collection thereof.

3. By a notification dated 12th December, 1949, issued under the Ordinance, the Government of the erstwhile State of Saurashtra included the town of Una in the Schedule to the Ordinance. Thus octroi and terminal tax became leviable in that town on certain commodities imported there. Section 9 of the Ordinance must also be noticed. According to it the Government was to maintain a separate fund in respect of all monies received by it on account of any of the taxes specified in section 3 for every city or town or local area specified in Schedule I and such fund after deducting therefrom the expenditure incurred in connection with the levy and collection of such tax was to be applied for the benefit of the inhabitants of the city or town or local area for which it was maintained. The purpose of levying the octroi duty or terminal tax under the Ordinance clearly was to add to the revenue of the local body for the benefit of the people residing within the jurisdiction of that particular local body.

4. So long as Una Municipality remained a municipality as constituted under the Act of 1901, there was no difficulty in the matter of collection of the octroi. After the Act came into force the Nagar Panchayat replaced the Municipality

in Una. It continued to collect the octroi till 1967 when the respondent, for the first time, raised an objection that it was not entitled to do so. As the Nagar Panchayat persisted in making the collection a petition under Article 226 of the Constitution was filed in the Gujarat High Court. It has been held by the High Court that since in the Rules promulgated under the Ordinance in Gujarati the collecting agency has been described as Sudhrai which means a municipality, the Nagar Panchayat was not competent to collect the octroi under the Ordinance as it did not fall within the meaning or definition of the term "municipality".

5. In our judgment the High Court was in error in coming to the conclusion that the Nagar Panchayat was not entitled to carry on the work of collection of octroi under the Ordinance even though the Ordinance which imposed liability to pay remained in force. Under section 307 of the Act where any local area was declared to be a gram or nagar under section 9 and if that area was co-extensive with the limits of a municipal district or municipal borough the municipality functioning in such local area was to cease to exist and in its place an Interim Gram Panchayat was to be constituted. According to clause (c) of that section the unexpended balance of the municipal fund and property including arrears of rates, taxes and fees belonging to the municipality and all rights and powers which vested in the municipality were to vest in the Interim Gram or Nagar Panchayat fund until a new panchayat was constituted in accordance with the provisions of section 308 (1). Clause (g) provided that all officers and servants in the employ of the municipality were to become officers and servants of the Interim Panchayat under the Act. Clause (k) was in the following terms :—

“Any law (other than the municipal law) or any rule, by-law, notification or order issued under such law, which was applicable to and in force in the local area immediately before it was declared as a gram or nagar under section 9, shall continue to apply to and to be in force in the local area until it is superseded”.

Section 308 dealt with the term of office of an Interim Panchayat and the steps to be taken to hold election for a new Gram or Nagar Panchayat. The appellant in the present case is indisputably the duly constituted Nagar Panchayat.

6 Section 307 of the Act leaves no room for doubt that wherever a Nagar Panchayat was constituted in place of the municipality, the municipality disappeared and all its funds including the right to realise taxes etc., vested in the Nagar Panchayat. In other words it was the Nagar Panchayat which was to function as the local body in the area previously constituted as a municipality. Clause (k) of section 307 clearly saved all laws or rules which were applicable to the local area which formed a municipality and they were to continue to apply and to remain in force in the area for which the Nagar Panchayat came to be constituted. By no stretch of reasoning could it be said that the Ordinance did not become applicable to the cities and towns specified in Schedule I which came to be constituted as Grams or Nagars under the Act. It is true that no fresh rules were promulgated under the Ordinance adapting the new terminology but even about the word *Sudhrai* it is a moot point whether it means only a municipality as constituted under the Act of 1901.

7 An argument was raised before the High Court that the Gujarati expression "sudhrai" meant any local self governing authority. The High Court observed that this expression as used in the *octroi* rules could not have a wider connotation than the expression "municipality" in section 9 of the Ordinance. When section 307 (k) of the Act saved the operation of all laws and rules etc., other than the municipal law the intention of the legislature was precise and definite and it is futile to suggest that the Ordinance was not covered by this saving clause. The object underlying clause (c) of section 307 was to vest in the Nagar Panchayat the entire municipal fund including the arrears of taxes and fees as also the powers and rights relating thereto which previously vested in the municipality. The *octroi* which was being collected under the Ordinance clearly fell within the ambit of clause (c). The power and the right, therefore, had passed to the Nagar

Panchayat and it was fully entitled to exercise it. Even if in the rules framed under the Ordinance certain expression created a difficulty that could not defeat the right and the power conferred on the Nagar Panchayat by the Act of realising and collecting the *octroi* which was being done under the Ordinance as saved by clause (k) of section 307.

8 If on account of the absence of proper adaptation in the rules made under the Ordinance any difficulty is being experienced in the collection of *octroi* it is always open to the State Government to make those clarifications and adaptations and indeed it would be expedient and desirable to do so. So long as the new rules are not framed under the Ordinance or adaptations are not made thereunder the Nagar Panchayat can certainly make the collection through the officers who discharge the same duties as were being performed by their counterparts mentioned in the rules. This is what seems to have been done up till 1967 without any objection by any one.

9 In the result the appeal succeeds and it is allowed with costs in this Court as also in the High Court.

V K¹ Appeal allowed

THE SUPREME COURT OF INDIA
(Civil Appellate Jurisdiction)

PRESENT — J C Shah, K S Hegde and
A N Grover, JJ

Hansraj Bagrecha

Appellant

The State of Bihar and others *Respondents*

(A) Bihar Sales Tax Act (XIV of 1959), as amended by Bihar Finance Act (1966), sections 3-A and 5-A—Validity—If infringe Article 301 of the Constitution of India—If inconsistent with section 15 of Central Sales Tax Act, 1956

Imposition of tax of the nature of purchase tax does not by itself restrict freedom of trade, commerce or intercourse. Imposition of tax may in certain circum-

*C.A. No. 1935 of 1969

18th September, 1970.

stances impede free flow of trade, commerce or intercourse. But every tax does not have that effect. Imposition of a purchase-tax by the State does not by itself infringe the guarantee of freedom under Article 301 of the Constitution.

[*Para. 12.*]

Since power to impose purchase tax under section 3-A of the Bihar Sales Tax Act on notified goods is not shown to restrict or impede the free flow of trade directly and immediately, it need not seek to derive, for its validity, support from Article 304 (b) of the Constitution.

[*Para. 14.*]

The contention that sections 3-A and 5-A of the Bihar Sales Tax Act are inconsistent with section 15 of the Central Sales Tax Act, 1956 is without substance. By section 15 of the Central Sales Tax Act in respect of the declared goods on transactions of sale or purchase the tax leviable is restricted to 3 per cent. and is not leviable at more than one stage. There is no dispute that the purchase tax on jute is leviable at the first point of purchase under section 3-A of the Bihar Sales Tax Act and the rate of tax also is not shown to exceed the maximum prescribed by section 15 of the Central Sales Tax Act. The provisions of sections 3-A and 5-A of the Bihar Sales Tax Act are not therefore inconsistent with the provisions of section 15 of the Central Sales Tax Act.

[*Para. 15.*]

(B) *Bihar Sales Tax Rules (1959), Rule 31-B and notification dated 26th December, 1967, issued by State Government under section 42 of Bihar Sales Tax Act read with rule 31-B—Validity.*

The power of the State Legislature is restricted to legislate in respect of intra-State transactions of sale and purchase and to matters ancillary or incidental thereto : it has no power to legislate for levy of tax on sales and purchase in the course of inter-state transactions. The power conferred by section 42 of the Bihar Sales Tax Act authorising the imposition of restriction on transport or movement of goods may only be exercised in respect of transactions which facilitate levy, collection and recovery of tax on transactions of intra-State sale or purchase. When rule 31-B seeks to prohibit transport of

goods to any place outside the State of Bihar unless a certificate is obtained from the appropriate authority, it seeks to prohibit transport of goods pursuant to transactions which may not even be of the nature of sale or purchase transactions: in any case it restricts transport pursuant to transactions in the course of inter-State trade and commerce. The operation of the rule is not restricted only to transactions in the course of intra-State trade and commerce. The rule authorises restrictions on inter-State transactions and is on that account unauthorised. For the same reasons the notification issued on 26th December, 1967, by the State Government in the purported exercise of its power under section 42 of the Bihar Sales Tax Act, 1959, read with rule 31-B of the Bihar Sales Tax Rules must be regarded as also unauthorised. [*Paras. 16, 18.*]

Appeal from the Judgment and Order dated the 4th January, 1969 of the Patna High Court in Civil Writ Jurisdiction Case No. 520 of 1967.

M.C. Chagla, Senior Advocate (*D. P. Singh*, Advocate, of *M/s. Ramamurthi & Co.*, and *V. J. Francis*, Advocate, with him), for Appellant.

Dr. L.M. Singhvi, Senior Advocate (*U. P. Singh*, Advocate, with him), for Respondents Nos. 1 to 4.

The Judgment of the Court was delivered by

Shah, J.—This appeal is filed with certificate granted by the High Court of Patna under Article 133 (1) (a) of the Constitution.

2. The appellant Hansraj Bagrecha carries on business in jute. In the course of his business the appellant buys raw jute from producers in West Bengal, transports it to Kishanganj Railway Station (which is within the State of Bihar) and then re-exports it to purchasers in West Bengal. He also buys raw jute in Bihar and exports it to the merchants or mill owners in West Bengal by rail from Kishanganj Railway Station.

3. The Bihar Sales Tax Act, 1959, as originally enacted did not provide for levy of purchase tax. By the Bihar Finance Act, 1966, with effect from 1st April, 1967, among others the following

sections were incorporated in the Bihar Sales Tax Act, 1959

"Section 3-A The State Government may from time to time, by notification declare any goods to be liable to purchase tax on turnover of purchase. Provided that general sales tax and special sales tax shall not be payable on the sale of goods or class of goods declared under this section "

Section 5-A "The purchase tax on goods declared under section 3 A shall be levied at the point of purchase made from a person other than a registered dealer "

By a notification dated 14th September, 1966, the Governor of Bihar declared 'jute' as a commodity liable to purchase tax at the rate specified in the notification

4 Section 42 of the Bihar Sales Tax Act by the first sub-section provided

"No person shall transport from any railway station, steamer station, airport, post-office or any other place, whether of similar nature or otherwise, notified in this behalf by the State Government, any consignment of such goods exceeding such quantity, as may be specified in the notification, except in accordance with such conditions as may be prescribed and such condition shall be made with a view to ensuring that there is no evasion of tax payable under this Act "

Section 46 of the Act invested the State Government with power to make rules for all matters expressly required or allowed by the Act to be prescribed and generally for carrying out the purposes of the Act and regulating the procedure to be followed, forms to be adopted and fees to be paid in connection with proceedings under the Act and all other matters ancillary or incidental thereto

5 In exercise of the powers conferred under section 46 (1) the State of Bihar promulgated under rules 31 B and 8-C Rule 31 B, which provided

"(1) No person shall tender at any railway station, steamer station, airport, post-office or any other place, whether of similar nature or otherwise, notified under section 48, any consignment of such goods exceeding such

quantity, as may be specified in the notification, for transport to any place outside the State of Bihar, unless such person has obtained a despatch permit in Form XXVIII-D from the appropriate authority referred to in the Explanation to rule 31 and no person shall accept such tender unless the said permit is surrendered to him "

Rule 8-C (1) provided

"The first purchase of goods declared under section 14 of the Central Sales Tax Act, 1956, shall be leviable to tax in terms of sections 3, 3 A and 6-A of the Act and no subsequent sales or purchases in respect of the said goods shall be liable to any tax under the Act "

After the enactment of sections 3 A and 5-A the State Government issued a notification dated 26th December, 1967 purporting to exercise power under section 42 of the Bihar Sales Tax Act, 1959, read with rule 31-B of the Bihar Sales Tax Rules, 1959 notifying that no person shall tender at any railway station mentioned in Schedule II, any consignment of goods mentioned in Schedule I, exceeding the quantity specified for transport to any place outside the State of Bihar and no person shall accept such tender in accordance with the conditions prescribed in rule 31-B of the Bihar Sales Tax Rules, 1959. Under Schedule I 'jute' exceeding 800 Kg could not be tendered for transport without "a despatch permit", and Kishanganj was one of the Railway Stations mentioned in Schedule II

6 In July, 1967, the Superintendent of Commercial Taxes addressed a letter prohibiting the railway authorities from loading jute goods and despatching them from any railway station within the Purnea District of Bihar except on production of a "registration certificate". By his letter dated 10th July, 1967, the Station Master Kishanganj called upon the Secretary, Jute Merchants Association, Kishanganj to produce a certificate as required in the letter of the Superintendent of Commercial Taxes, before "loading jute goods for despatch was commenced and informed them that in default wagon allotted to the jute merchants shall be cancelled and registration fees forfeited and that "demurrage" will be charged.

The appellant's request that jute booked by him be despatched from Kishanganj was turned down by the railway authorities, because the registration certificate issued by the Superintendent of Commercial Taxes, Purnea for the movement of jute from the place was not produced.

7. The appellant then moved a petition before the High Court of Patna on 29th August, 1967, challenging the validity of sections 3-A, 5-A, 42 and 46 and rule 31-B of the Bihar Sales Tax Rules, 1959. The High Court of Patna dismissed the petition. With certificate granted by the High Court this appeal has been preferred by the appellant.

8. In support of the appeal, Counsel for the appellant raised three contentions:

(1) that sections 3-A and 5-A as incorporated by the 4th Finance Act of 1966, infringed the guarantee of freedom of trade under Article 301 of the Constitution and since the amendment made by the Finance Act, 1966 did not receive the assent of the President under Article 304 (b) the amendment was not saved;

(2) that sections 3-A and 5-A and rule 8-G were contrary to section 15 of the Central Sales Tax Act, 1956 and were void on that account; and

(3) that rule 31-B framed by the State Government and the notification issued on 26th December, 1967, were unauthorised and liable to be struck down.

9. Article 301 of the Constitution guarantees freedom of trade, commerce and intercourse throughout the territory of India. By Article 302 the Parliament is authorised by law to impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest. Article 303 (1) imposes restrictions upon the power which the Parliament or the Legislature of a State may exercise to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the lists in the Seventh Schedule. But that clause does not

operate to restrict the power of the Parliament to make any law giving, or authorise the giving of, any preference or making, or authorising the making of, any discrimination, if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India: Article 303 (2). Article 304 provides in so far as it is relevant:

"Notwithstanding anything in Article 301 or Article 303 the Legislature of a State may by law—

(a) * * *

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest: Provided that no Bill or amendment for the purpose of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."

Article 304 is in terms a restriction on the freedom guaranteed by Article 301. Notwithstanding the amplitude of the freedom of trade, commerce and intercourse throughout the territory of India, the Legislature of a State may by law impose among others such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest. But that authority to impose reasonable restrictions on the freedom of trade, may only be exercised by the Legislature of a State if the Bill or amendment for the purpose of clause (b) is introduced or moved in the Legislature of a State with the previous sanction of the President.

10. It was contended that since section 3-A providing for the levy of purchase tax imposes a restriction on the freedom of trade, commerce and intercourse and on that account violates the freedom of trade guaranteed by Article 301, it may be saved only if it is legislation of the nature contemplated by Article 304 (b) and the Bill which was enacted into the Act received the previous assent of the President. The assumption that the levy of purchase tax must be deemed in all circumstances to violate the guarantee under Article 301, and the levy will be valid only if the Act is enacted by the State Legislature

with the previous sanction of the President, cannot be accepted as correct. This Court in *The State of Madras v N K Nataraya Mudaliar*¹, examined the validity of laws which impose taxes on sale in the light of Article 301. It was observed at page 839

"This Article (Article 301) is couched in terms of the widest amplitude, trade, commerce and intercourse are thereby declared free and unhampered throughout the territory of India. The freedom of trade so declared is against the imposition of barriers or obstructions within the State as well as inter State, all restrictions which directly and immediately affect the movement of trade are declared by Article 301 to be ineffective. The extent to which Article 301 operates to make trade and commerce free has been considered by this Court in several cases. In *Atiabari Tea Co. Ltd v The State of Assam and others*², Gajendragadkar, J, speaking for himself and Wanchoo and Das Gupta, JJ, observed at page 860

"we think it would be reasonable and proper to hold that restrictions, freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade

In *Automobile Transport (Rajasthan) Ltd v The State of Rajasthan and others*³, the view expressed by Gajendragadkar, J, in *Atiabari Tea Co's case*², was accepted by the majority. Subba Rao, J, who agreed with the majority observed that the freedom declared under Article 301 of the Constitution of India referred to the right of free movement of trade without and obstructions by way of barriers, inter-State or intra-State, or other impediments operating as such barriers. The same view was expressed in *Firm A T B Mehtab Majid and Company v State of Madras and another*⁴, by a unanimous Court. It must be

taken as settled law that the restrictions or impediments which directly and immediately impede or hamper the free flow of trade, commerce and intercourse fall within the prohibition imposed by Article 301 and subject to the other provisions of the Constitution they may be regarded as void."

11 But it is said that by imposing tax on sales, no restriction hampering trade is imposed. In the *Atiabari Tea Company's case*², Gajendragadkar, J, observed

"Taxes may and do amount to restrictions, but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301. The argument that all taxes should be governed by Article 301 whether or not their impact on trade is immediate or mediate, direct or remote, adopts, in our opinion, an extreme approach which cannot be upheld."

In a recent judgment of this Court in *The Andhra Sugars Ltd, and another v The State of Andhra Pradesh and others*⁵ Bachawat, J, speaking for the Court after referring to the observations made by Gajendragadkar, J, in *Atiabari Tea Company's case*², observed

"This interpretation of Article 301 was not dissented from in *Automobile Transport (Rajasthan) Ltd v State of Rajasthan*³. Normally, a tax on sale of goods does not directly impede the free movement or transport of goods. Section 21 is no exception. It does not impede the free movement or transport of goods and is not violative of Article 301."

Section 21 of the Andhra Pradesh Sugar cane (Regulation of Supply and Purchase) Act which was referred to in the judgment authorised the State Government to levy a tax at such rate,

"not exceeding five rupees per metric tonne as may be prescribed on the purchase of cane required for use, consumption or sale in a factory. It must, therefore, be regarded as settled

1 (1969) 1 S.C.J. 318 (1969) 1 An.W.R. (S.C.) 28 (1968) 1 M.L.J. (S.C.) 28 (1968) 3 S.C.R. 829

2 (1961) 1 S.C.R. 809

3 (1964) 1 An.W.R. (S.C.) 115 (1964) 1 M.L.J. (S.C.) 115 (1964) 1 S.C.J. 353 (1963) 2 S.C.R. (Supp.) 435

4 (1963) 1 S.C.R. 491

1 (1961) 1 S.C.R. 809

2 (1968) 21 S.T.C. 212 (1968) 1 M.L.J. (S.C.) 117 (1968) 1 An.W.R. (S.C.) 117 (1968) 1 S.C.J. 694

3 (1963) 1 S.C.R. 491

law that a tax may in certain cases directly and immediately restrict or hamper the flow of trade, but every imposition of tax does not do so."

12. Imposition of tax of the nature of purchase tax does not by itself restrict freedom of trade, commerce or intercourse. Imposition of tax may in certain circumstances impede free flow of trade, commerce or intercourse. But every tax does not have that effect. Imposition of a purchase-tax by the State does not by itself infringe the guarantee of freedom under Act, 301.

13. The argument that imposition of sales or purchase tax must be regarded in all cases as infringing the guarantee of freedom under Article 301 cannot be accepted as correct.

14. The appellant filed the petition out of which this appeal arises soon after the Station Master informed the Jute Merchants Association about his inability to book consignments of jute. He has made no averments in the petition which support the plea that imposition of purchase-tax "directly and immediately restricts or impedes" the free flow of trade. Since power to impose purchase tax under section 3-A on notified goods is not shown to restrict or impede the free flow of trade directly and immediately, it need not seek to derive, for its validity, support from Article 304 (b).

15. The contention that sections 3-A and 5-A are inconsistent with section 15 of the Central Sales Tax Act, 1956, is without substance. By section 14 of the Central Sales Tax Act, 1956 certain classes of goods are declared goods of special importance in inter-State trade or commerce. Jute is one of such classes of goods. By section 15 as amended by the Central Sales Tax Second Amendment Act XXXI of 1958 it is provided:

"Every sales tax law of a State shall, in so far as it imposes or authorises the imposition of a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions, namely :—

(a) the tax payable under that law in respect of any sale or purchase of

such goods inside the State shall not exceed three per cent of the sale or purchase price thereof, and such tax shall not be levied at more than one stage ;

(b) where a tax has been levied under that law in respect of the sale or purchase inside the State of any declared goods and such goods are sold in the course of inter-State trade or commerce, the tax so levied shall be refunded to such person in such manner and subject to such conditions as may be provided in any law in force in that State".

By section 15 of the Central Sales Tax Act in respect of the declared goods on transactions of sale or purchase the tax leviable is restricted to 3 per cent, and is not leviable at more than one stage. There is no dispute that the purchase tax on jute is leviable at the first point of purchase under section 3-A of the Bihar Sales Tax Act, and the rates of tax also is not shown to exceed the maximum prescribed by section 15 of the Central Sales Tax Act. The provisions of sections 3-A and 5-A of the Bihar Sales Tax Act are not therefore inconsistent with the provisions of section 15 of the Central Sales Tax Act.

16. But, in our judgment, rule 31-B of the Bihar Sales Tax Rules, 1959, and the notification issued on 26th December, 1967, are unauthorised and must be struck down. The Bihar Sales Tax Act is enacted by the Legislature to consolidate and amend the law relating to the levy of tax on the sale and purchase of goods in Bihar. The State Legislature is competent in enacting sales-tax legislation to make a provision which is ancillary or incidental to any provision relating to levy, collection and recovery of sales-tax and purchase-tax. A provision which is (made) by the Act or by the Rules which seeks to prevent evasion of liability to pay tax on intra-State sales or purchases would therefore be within the competence of the Legislature or the authority competent to make the rules. But the State Legislature has no power to legislate for the levy of tax on transactions which are carried on in the course of inter-State trade or commerce or in the course of export. Section 42 of the Bihar Sales

Tax Act, 1959, prevents any person from transporting from any railway station, steamer station, air port, post-office or any other place any consignment of such goods exceeding the quantity specified with a view to ensuring that there is no evasion of tax payable under the Act. But the power under section 42 can only be exercised in respect of levy, collection and recovery of intra State sales or purchase tax. It cannot be utilised for the purpose of ensuring the effective levy of inter-State sales or purchase tax.

17 The appellant purchased jute both within and without the State of Bihar. In respect of transactions of purchase within the State of Bihar and despatch of goods liability to pay purchase tax at the point of purchase may arise. In respect of goods which are purchased in the State of West Bengal and brought within the State of Bihar and then despatched to other States in the course of inter-State transactions, no question of levy of purchase tax under the Bihar Sales Tax Act arises. Rule 31-B framed by the State Government seeks to prohibit transport in pursuance of transactions which are inter-State for in terms it prohibits transporting of goods to any place outside the State of Bihar. Again transport of goods for personal consumption or use, or of goods gifted, pledged or dealt with otherwise than by sale fall within the injunction contained in rule 31-B.

18 The power of the State Legislature is restricted to legislate in respect of inter-State transactions of sale and purchase and to matters ancillary or incidental thereto, it has no power to legislate for levy of tax on sales and purchase in the course of inter State transactions. The power conferred by section 42 authorising the imposition of restriction on transport or movement of goods, may only be exercised in respect of transactions which facilitate levy, collection and recovery of tax on transactions of, intra State sale or purchase. When rule 31-B seeks to prohibit transport of goods to any place outside the State of Bihar unless a certificate is obtained from the appropriate authority, it seeks to prohibit transport of goods pursuant to transactions which may not even be of the nature of sale or purchase transactions, in any case it

restricts transport pursuant to transactions in the course of inter State trade and commerce. The operation of the rule is not restricted only to transactions in the courses of inter State trade and commerce. The rule authorises restrictions on inter State transactions and is on that account unauthorised. For the same reasons the notification issued on 26th December, 1967, must be regarded as also unauthorised.

19 In the view we have taken rule 31 B and the notification issued by the State Government on 26th December, 1967, must be declared *ultra vires*, and since rule 31-B and the notification are *ultra vires* the communication issued by the Superintendent of Commercial Taxes to the Railway Authorities must also be declared unauthorised. A writ will therefore issue declaring rule 31 B and the notification issued by the Government of Bihar on 26th December, 1967, *ultra vires*, and the letter written by the Superintendent of Commercial Taxes to the Railway Authorities is also declared unauthorised.

20 Having regard to the circumstances, we think there should be no order as to costs.

V K Appeal allowed

THE SUPREME COURT OF INDIA
(Original Jurisdiction)

PRESENT—J C Shah, K S Hegde and
A N Grover, JJ

Minor A Periakaruppan and another
Petitioners*

The State of Tamil Nadu and others, etc
Respondents

Minor Raja Mohideen and 2 others
Interveners

(A) Constitution of India (1950), Articles 14 and 15—Admission into Medical Colleges in the State of Tamil Nadu—Selection of candidates for—Unitwise distribution of seats—If violative of Articles 14 and 15

Unitwise distribution of seats for the purpose of selection of candidates for

admission into Medical Colleges in the State of Tamil Nadu is violative of Articles 14 and 15 of the Constitution. The fact that an applicant is free to apply to any one unit does not take the scheme outside the mischief of Articles 14 and 15. Before a classification can be justified, it must be based on an objective criterion and further it must have reasonable nexus with the object intended to be achieved. The object intended to be achieved in the present case is to select the best candidates for being admitted to Medical Colleges. That object cannot be satisfied by the unitwise distribution of seats.

[Para. 11.]

(B) *Education — Admission into Medical Colleges in the State of Tamil Nadu—Selection of candidates for—Earmarking 75 marks out of 275 for interview—Propriety—Tests prescribed for interview marks if objective—Marks given in lump sum and not on itemised basis for each test prescribed—Legality—Relevant fact for interview marks.*

Earmarking 75 marks out of 275 for interview *prima facie* appears to be excessive. But while it may be appropriate for the Government to re-examine the question it cannot be said that it was not within the power of the Government to provide such high marks for interview.

[Paras. 12, 14.]

The contention that no objective criterion was fixed for interview is untenable. The selectors were asked to interview candidates and award marks on the basis of the following tests: (1) Sports or N.C.C. activities; (2) extra curricular special services; (3) general physical condition and endurance; (4) general ability and (5) aptitude. These tests are sufficiently objective in character. It cannot be denied that extra curricular activities like sports, N.C.C., special services, general physical condition and endurance and general ability are objective tests. The aptitude referred to is aptitude for medical profession.

[Para. 15.]

It is true that the relevant rule did not prescribe separate marks for separate heads. But that did not permit the selection committee to allot marks as

it pleased. Each one of the tests prescribed had its own importance.

[Para. 16.]

In the present case the selection committee had not divided the interview marks under various heads nor were the marks given on an itemised basis. The marks list produced shows that the marks were given in a lump. This is clearly illegal.

[Para. 17.]

The interview held in the present case was also vitiated for the reason that the selection committee took into consideration irrelevant matters and at the same time failed to take into consideration matters required to be taken into consideration. One of the extra curricular activities that the committee was required to take into consideration was N.C.C., training. That was clearly an objective test but from the counter-affidavit filed the committee was of the view that the candidate must also know why he joined in the national life. These are irrelevant considerations. Again the test like the physical condition and endurance can be best judged by a competent medical practitioner after a careful medical examination. It was in the very nature of things not possible for the selection committee, though composed of eminent doctors, to find out the physical condition and endurance by a mere look at the candidate. It is also clear that much attention was not given to the general ability which test includes past performance of the applicants and the varied interest taken by them.

[Para. 18.]

(C) *Constitution of India (1950), Article 15 (1) and (4)—Admission into Medical Colleges in the State of Tamil Nadu—Reservation of 41% of seats for backward classes—If excessive—Classification of backward classes on the basis of caste—Validity.*

There is no basis for the contention that reservation of 41% of the seats for admission into the Medical Colleges of Tamil Nadu for backward classes is excessive. It should not be forgotten that it is against the immediate interest of the nation to exclude from the portals of the Medical Colleges qualified and competent students but then the immediate advantage of the nation have to be harmonised with its long range interests. It cannot be

denied that unaided many sections of the people in this country cannot compete with the advanced sections of the nation. That is why in *M R Balaji v State of Mysore* (1963) 1 S C R (Supp) 439 A I R 1963 S C 649, the Supreme Court held that the total of reservations for backward classes, scheduled castes and scheduled tribes should not ordinarily exceed 50% of the available seats. In the present case it is 41%. On the materials placed it cannot be held that the said reservation is excessive. [Para 21]

Rajendran's case, (1968) 2 S C R 786 (1968) 2 S C J 801, is an authority for the proposition that the classification of backward classes on the basis of castes is within the purview of Article 15 (4) of the Constitution if those castes are shown to be socially and educationally backward. There is no gainsaying the fact that there are numerous castes in this country which are socially and educationally backward. To ignore their existence is to ignore the facts of life. But all the same the Government should not proceed on the basis that once a class is considered as a backward class it should continue to be a backward class for all times. Such an approach would defeat the very purpose of the reservation. The Government should always keep under review the question of reservation of seats and only the backward should be allowed to have the benefit of the reservation. Reservation of seats should not be allowed to become a vested interest. It must be remembered that the Government's decision in this regard is open to judicial review.

[Para 30]

(D) *Constitution of India* (1950), Article 32—Petition under, challenging selection of candidates for admission to Medical Colleges by State Government—Selected candidates not made parties—Selection cannot be set aside though it is not in accordance with the rules.

[Para 31]

Petition under Article 32 of the Constitution of India for enforcement of the Fundamental Rights

K K Venugopal and R Gopalakrishnan, Advocates, for the Petitioner (In W P No 285 of 1970)

M. Natesan, Senior Advocate (*R Gopalakrishnan*, Advocate, with him), for the Petitioner (In W P No 314 of 1970)

S Govind Swaminathan, Advocate-General, for the State of Tamil Nadu (*A V Rangan* and *S Mohan*, Advocates, with him), for Respondents Nos 1 to 5 (In W P No 285 of 1970) and the Respondents (In W P No 314 of 1970)

M K Ramamurthi, Senior Advocate (*Vineet Kumar*, Advocate with him), for the Interveners (In W P No 285 of 1970)

The Judgment of the Court was delivered by

Hegde, J—In these two petitions under Article 32 of the Constitution the petitioners who unsuccessfully sought admission to certain Medical Colleges in the State of Tamil Nadu have asked for a writ of *mandamus* to direct the State of Tamil Nadu to allot to each one of them a seat in one of the Government Medical Colleges in that State and for consequential orders.

2 In the State of Tamil Nadu, there are eight Medical Colleges out of which three are situated in the city of Madras, one in Madurai, one in Chingleput, one in Coimbatore, one in Thanjavur and one in Tirunelveli. The total seats available in Madras Colleges are 500. The sanctioned strength of seats in Madurai, Chingleput, Coimbatore, Thanjavur and Tirunelveli are 200, 50, 100, 200 and 75 respectively. Thus the total number of medical seats available in the Government Colleges for 1st year of M B B S course in the State of Tamil Nadu are 1,125. We understand that for these seats nearly 7,000 students applied for admission.

3 In the previous years except in the year 1967-68, selection of candidates for admission to the 1st year M B B S, course was done on Statewise basis. In the year 1967-68 the seats were distributed on districtwise basis but that scheme was held to be invalid by this Court in *Minor P Rajendran v State of Madras and others*¹. Thereafter the selec-

¹ (1968) 2 M L J (S C) 121 (1968) 2 A n W R (S C) 121 (1968) 2 S C J 801 (1968) 2 S C R 786

tion was again made on Statewise basis in the years 1968-69 and 1969-70, but in the current year that system was given up and selection was directed to be made on the basis of what is known as unitwise basis. Under the present scheme the Medical Colleges in the city of Madras were constituted as one unit and each one of the other Medical Colleges in the mofussil was constituted as a unit. Thus six units were created in the State. In respect of each one of the units a separate selection committee was constituted. The intending applicants were asked to apply to any one of the committees but they were advised to apply to the committee nearest to their place of residence as far as possible. They were told that if they applied to more than one committee their applications will be forwarded by the Government to only one of the committees.

4. A few seats out of the 1125 seats were reserved for certain special categories of students. As there is no dispute about those seats we shall not refer to them hereafter. Out of the remaining seats 41 per cent. seats were reserved for students coming from socially and educationally backward classes, Scheduled Castes and Scheduled Tribes. The rest of them were placed in the general pool.

5. In the State of Tamil Nadu actual marks are not being given in the Pre-University examination. The papers were valued on the basis of grades. There are all together four grades *i.e.*, grades A to D. For the purpose of selection to first year M.B.B.S. course only marks obtained in the optional subjects were taken into consideration. Selection to the seats with which we are concerned in these petitions is confined to students who have taken in their Pre-University examination Physics, Chemistry and Biology as their optional subjects though each of these subjects carried a maximum of 100 marks thus a total of 300 marks, for the purpose of selection to the first year M.B.B.S. course the procedure prescribed was to take the minimum marks provided for the grade secured by the applicant in Chemistry and Physics and add them together and thereafter divide the total by two and to that add the minimum marks provided for the

grade secured by the applicant in Biology. Thus the total marks in the optional subjects was reduced from 300 to 200. All the applicants in the general pool who secured 110 or more marks calculated on the basis of the formulae referred to earlier were called for interview by the selection committees. Selection committees were authorised to give a maximum of 75 marks at the interview. The selection committees were asked to award these marks on the basis of following tests:

- (1) Sports or National Cadet Corps activities;
- (2) Extra Curricular special services;
- (3) General physical condition and endurance;
- (4) General ability; and
- (5) Aptitude.

6. The selection committees were directed to prepare a gradation list on the basis of the total marks obtained by each applicant and submit the same to the Government.

7. The petitioners before us appear to have had brilliant academic career. The facts mentioned by the petitioners in this regard were not controverted by the respondents. The petitioner in Petition No. 285 of 1970 came out within first three ranks in the 10th and 11th standards and in the final examination he secured 451 marks out of the total of 700. He stood third in his school. During his school career he had taken keen interest in extra-curricular activities. He was a N.C.C. cadet and passed creditably the 'A' certificate examination. He had also obtained certificate in boxing. He had joined the correspondence course conducted by the Voice Prophecy Institute, New Delhi and obtained a certificate in Health and Hygiene. After, having passed his Anglo Indian High School examination creditably he joined Madurai College, in the Pre-University course taking Physics, Chemistry and Biology as his science subjects. In that course he secured first class with grade D plus in Physics and Chemistry and A plus in Biology. He stood fourth in his college. The grade D plus represents 85 to 99 per cent. marks and A plus 65 to 75 per cent. marks.

7-a The petitioner in Petition No 314 of 1970 passed her Pre-University examination in March, 1970, from the Scott Christian College, Nagercoil which college stands affiliated to Madurai University. She secured first class with grade 'D' (75 to 85 per cent marks) in Physics, grade D plus (85 to 99 per cent) in Chemistry and D (75 to 85 per cent) in Biology. The petitioner also had a brilliant career throughout in the High School classes as well as in the college class. She secured a merit card for the highest distinction consecutively for the years 1965-66, 1966-67 and 1967-68 in Standards 8 to 10 of St. Joseph Convent, Nagercoil. In the S.S.L.C examination held in March, 1969 she secured 456 marks out of 600. She obtained distinction in extra-curricular activities both in school and college. She had been a girl guide. She took keen interest in games and sports particularly in netball, throw ball and tennis. She was a member of the representative team. She also passed with merit the pianoforte playing Grade I examination conducted by the Trinity College of Music, London.

8 The petitioners before this Court challenged the validity of the selections made on various grounds. They contended that the unitwise selection contravenes Articles 14 and 15 of the Constitution inasmuch as the same places the applicants of some of the units in a better position than those who applied to other units. It was alleged that the ratio between applicants and number of seats in the Coimbatore unit was 1:13, in Tirunelveli 1:10, in Chingleput 1:6, in the Madras 1:5½, in Thanjavur 1:6, and in Madurai 1:7½. It was further alleged that several applicants who secured lesser marks than the petitioners before this Court were selected merely because their applications came to be considered in other units. It was also alleged that this unitwise scheme was merely intended as a device to get over the decision of this Court in *Rajendran's case*¹. It was next contended on behalf of the petitioners that the interview held was a farce. Each applicant was interviewed hardly

for three minutes. During that interview irrelevant questions were put to them. The interview marks were manipulated so as to pull up under-achieving applicants and downgrade those who had secured excellent marks in their Pre-University examination. It was said that a perusal of the marks list would show that the whole selection was a manipulation. The applicants who had failed more than once and ultimately secured bare second class were selected while the first rate applicants who had secured first class with high marks were rejected. It was urged on their behalf that even the students who get the minimum marks could be pulled up by the selection committee by plumping 70 or more out of 75 interview marks whereas the students who have secured 170 marks the highest marks that could have been secured under the admission rules in Pre University examination could be pulled down by giving less than 10 marks out of 75 marks. The petitioners' complaint is that after the interview the selection committee carried the marks given by them to Madras and there the Government has manipulated the mark in such a way as to select their favourites and reject such of them in whom the Government was not interested.

9 It was also urged that no guidelines were provided for awarding marks at the interview and therefore the power conferred on the selection committee is an arbitrary power which is capable of being misused and in fact has been misused. It was contended that the list of backward classes provided to the committee was solely made on the basis of caste and as such that list did not conform to the requirements of Article 15 (4) of the Constitution. The petitioners also urged that the reservation made for backward classes is disproportionately high and further the division of backward classes into backward classes and more backward classes was impermissible under law.

10 We shall first take up the plea regarding the division of medical seats on unitwise basis. It is admitted that the minimum marks required for being selected in some unit is less than in the other unit. Hence *prima facie* the scheme in question results in discrimination against some

¹ (1968) 2 S.C.R. 786 (1968) 2 S.C.J. 801 (1968) 2 M.L.J. (S.C.) 121 (1968) 2 An.W.R. (S.C.) 121

of the applicants. In *Rajendran's case*¹, this Court ruled that the districtwise distribution of available seats is violative of Article 15 of the Constitution. But it was contended on behalf of the State that the unitwise distribution of seats was adopted for administrative convenience. It was said that it was not possible for one selection committee to interview all the applicants. Therefore several committees had to be constituted. In the past when applicants were interviewed by several committees there were complaints that the standard adopted by one committee differed from that adopted by others and therefore the applicants' ability was not tested by a uniform standard. Further it was said that when selections were made by several committees there was delay in preparing a consolidated list. We are unable to accept these grounds as being real grounds for classification. The grievance when selections were made by several committees in a statewide selection the standard adopted by various committees differed, would continue even when selections are made by several committees in a unitwise selection. Whether the selection is made by selection committees on statewide basis or unitwise basis, the standard adopted by various committees is bound to vary. Hence in principle it makes no difference.

11. Now coming to the question of delay, we see no reason why there should be any delay in preparing a consolidated list. At any rate the delay caused is not likely to be such as to justify departure from the principle of selection on the basis of merit on a statewide basis. Before a classification can be justified, it must be based on an objective criteria and further it must have reasonable nexus with the object intended to be achieved. The object intended to be achieved in the present case is to select the best candidates for being admitted to Medical Colleges. That object cannot be satisfactorily achieved by the method adopted. The complaint of the petitioners is that unitwise distribution of seats is but a different manifestation of the districtwise distribution sought in 1967-68,

has some force though on the material on record we will not be justified in saying that the unitwise distribution was done for collateral purposes. Suffice it to say that the unitwise distribution of seats is violative of Articles 14 and 15 of the Constitution. The fact that an applicant is free to apply to any one unit does not take the scheme outside the mischief of Articles 14 and 15. It may be remembered that the students were advised as far as possible to apply to the unit nearest to their place of residence.

12. Earmarking 75 marks out of 275 marks for interview as interview marks *prima facie* appears to be excessive. It is not denied that the interview lasted hardly for three minutes for each candidate. In the course of three minutes interview it is hardly possible to assess the capability of a candidate. In most cases the first impression need not necessarily be the best impression. But under the existing conditions in this country we are unable to accede to the contention of the petitioners that the system of interview, as in vogue in this country is so defective as to make it useless. It is true that various researches conducted in other countries particularly in U.S.A. show that there is possibility of serious errors creeping in interviews made on haphazard basis. C.W. Valentine on "Psychology and its Bearing on Education" refers to the marks given to the same set of persons interviewed by two different competent Boards and this is what is stated in his book :

"The members of each board awarded a mark to each candidate and then he was discussed and an average mark agreed on.

When the orders of merit for the two Boards were compared it was found that the man placed first by Board A was put 13th by Board B when the man placed 1st by Board B was 11th with Board A."

13. Even when the interviews are conducted by impartial and competent persons on scientific lines very many uncertain factors like the initial nervousness on the part of some candidates, the mood in which the interviewer happens to be and the odd questions that may be put to the persons interviewed may all

1. (1968) 2 S.C.R. 786 : (1968) 2 S.C.J. 801 : (1968) 2 M.L.J. (S.C.) 121 : (1968) 2 An.W.R. (S.C.) 121.

go to affect the result of the interview. But as observed by this Court in *R Chitraletha and another v State of Mysore and others*¹

"In the field of education there are divergent views as regards the mode of testing the capacity and calibre of students in the matter of admissions to colleges. Orthodox educationists stand by the marks obtained by a student in the annual examination. The modern trend of opinion insists upon other additional tests, such as interview, performance in extra-curricular activities, personality test, psychiatric tests etc. Obviously we are not in a position to judge which method is preferable or which test is the correct one. If there can be manipulation or dishonesty in allotting marks at interviews, there can equally be manipulation in the matter of awarding marks in the written examination. In the ultimate analysis, whatever method is adopted its success depends on the moral standards of the members constituting the selection committee and their sense of objectivity and devotion to duty. This criticism is more a reflection on the examiners than on the system itself. The scheme of selection, however, perfect it may be on paper, may be abused in practice. That it is capable of abuse is not a ground for quashing it. So long as the order lays down relevant objective criteria and entrusts the business of selection to qualified persons, this Court cannot obviously have any say in the matter."

14 While we do feel that the marks allotted for interview are on the high side and it may be appropriate for the Government to re-examine the question, we are unable to uphold the contention that it was not within the power of the Government to provide such high marks for interview or that there was any arbitrary exercise of power. It was urged on behalf of the petitioners that the interview marks were allotted on collateral considerations. We are told that the selection committees were tools in the hands of the Government and the Government manipulated the marks

in such a way as to facilitate the selection of those students in whom the members of the party in power were interested. These allegations were denied by the respondents. While elaborating their arguments on their plea of *mala fides* the learned Council for the petitioners invited our attention to the marks lists which according to them clearly showed that the marks given at the interview are—by and large—in inverse proportion to the marks obtained by the candidates at the University examination. We were also told that the marks lists on their face show that the interview marks were manipulated. It was said that marks were so given as to see that certain candidates got at least the minimum required for selection. While there is some basis for these criticisms there is not sufficient material before us from which we could conclude that there was any manipulation in preparing the gradation list. It is true that numerous students whose performance in the University examination was none too satisfactory nor their past records creditable had secured very high marks at the interview. It is also true that a large number of students who had secured very high marks in the University examination and whose performance in the earlier classes was very good had secured very low marks at the interview. This circumstance is undoubtedly disturbing but the Courts cannot uphold the plea of *mala fides* on the basis of mere probabilities. We cannot believe that any responsible Government would stoop to manipulating marks. The selection committees consisted of eminent persons. Most of them are medical practitioners occupying responsible position in life. It would be a bad day for this country if such persons take to manipulation of marks. Hence we cannot accept the contention that the interview marks were manipulated either by the Government or by the selection committees.

15 It was next urged that no objective criterion was fixed for interview. We are unable to accept this contention as well. The selectors were asked to interview candidates on the basis of the five criterion prescribed to which we have made reference earlier. Those tests are sufficiently objective in character.

Similar tests were held to be objective by this Court in *Chitralekha's case*¹. It cannot be denied that extra curricular activities like sports, N.C.C., special services, general physical condition and endurance and general ability are objective tests. The aptitude referred to in the rule, in our opinion, is aptitude for medical profession.

16. It was next contended that separate marks had not been allotted for each one of the tests enumerated in the rule. A total of 75 interview marks were placed at the disposal of the selection committee and from out of those the committee could award marks according to its sweet will and pleasure. Such a power it was said is an arbitrary power. We were told that the entire 75 marks could have been given to a candidate even if he satisfied only one out of the five criterion prescribed. It is true that the rule did not prescribe separate marks for separate heads. But that in our opinion did not permit the selection committee to allot marks as it pleased. Each one of the tests prescribed had its own importance. As observed at footnote 20 at page 485 of *American Jurisprudence* Vol. 15 that the interviewers need not record precise questions and answers when oral tests are used to appraise personality traits; it is sufficient if the examiner's findings are recorded on the appraisal sheet according to the personal qualifications itemised for measure. A contention similar to those advanced by the petitioners came up for consideration before the Mysore High Court in *D. G. Viswanath v. Chief Secretary of Mysore and others*².

Therein the Court observed thus:

"It is true that Annexure IV does not specifically mention the marks allotted for each head. But from that circumstances it cannot be held that the Government had conferred an unguided power on the Committees. In the absence of specific allocation of marks for each head, it must be presumed that the Government considered that each of the heads mentioned in Annexure IV as being equal in impor-

tance to any other. In other words, we have to infer that the intention of the Government was that each one of those heads should carry 1/5th of the 'Interview' marks."

17. We may note that the committee had not divided the interview marks under various heads nor were the marks given on itemised basis. The marks list produced before us shown that the marks were given in a lump. This is clearly illegal.

18. The interview held was also vitiated for the reason that the selection committee took into consideration irrelevant matters and at the same time failed to take into consideration matters required to be taken into consideration. In the counter-affidavit filed by the Chairman of the selection committee it was averred that in allotting interview marks the committee took into consideration qualities such as pleasant personality, quick thinking etc. One of the extra-curricular activities that the committee was required to take into consideration was N.C.C. training. That was clearly an objective test but from the counter-affidavit filed, it appears that the committee did not think that it was sufficient if an applicant had good record as a cadet, but according to it he must also know why he joined the N.C.C. and what role N.C.C. plays in the national life. These in our opinion, are irrelevant considerations. Again the test like the physical condition and endurance can be best judged by a competent medical practitioner after a careful medical examination. It was in the very nature of things not possible for the selection committee though composed of eminent doctors to find out the physical condition and endurance by a mere look at the candidate. It is clear from the affidavit filed on behalf of the selection committees that at the time of interview much attention had not been given to the general ability which test includes past performance of the applicants and the varied interest taken by them.

19. From the facts placed before us, it is clear that the candidates were not interviewed in accordance with the rules governing the interview.

1. (1964) 6 S.C.R. 368.

2. A.I.R. 1964 Mys. 132.

20 It was next urged that the classification of backward classes by the Government into backward classes and more backward classes was illegal and in support of that contention, our attention was invited to the decision of this Court in *M R Balaji and others v State of Mysore*¹. It is unnecessary to go into that question because for the purpose of the present selection the backward classes were not sub-divided into backward classes and more backward classes. What had happened is that the list of backward classes supplied to the selection committee showed that some of the communities are more backward than others but that list was prepared for the purpose of fee concession. For the purpose of the present selection all the classes shown therein were treated as backward classes.

21 There is no basis for the contention that the reservation made for backward classes is excessive. We were not told why it is excessive. Undoubtedly we should not forget that it is against the immediate interest of the Nation to exclude from the portals of our medical colleges qualified and competent students but the immediate advantages of the Nation have to be harmonised with its long range interests. It cannot be denied that unaided many sections of the people in this country cannot compete with the advanced sections of the Nation. Advantages secured due to historical reasons should not be considered as fundamental rights. Nation's interest will be best served—taking a long range view—if the backward classes are helped to march forward and take their place in line with the advanced section of the people. That is why in *Balaji's case*¹, this Court held that the total of reservations for backward classes, Scheduled Castes and Scheduled Tribes should not ordinarily exceed 50 per cent of the available seats. In the present case it is 41 per cent. On the material before us we are unable to hold that the said reservation is excessive.

22 Considerable arguments were advanced assailing the enumeration of backward classes. It was said that the concerned list included only castes and not classes. The petitioners' case is that every one of the classes mentioned therein

is in reality a caste. Hence that list cannot be sustained. In *Balaji's case*¹, this Court held that though caste is a relevant factor in ascertaining a class for the purpose of Article 15 (4), a class cannot be constituted solely on the basis of, caste. Gajendragadkar, J (as he then was) speaking for the Court observed

"That though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens it cannot be made the sole or the dominant test in that behalf. Social backwardness is on the ultimate analysis the result of poverty, to a very large extent. The classes of citizens who are deplorably poor automatically become socially backward. They do not enjoy a status in society and have therefore to be content to take a backward seat. It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens."

23 In *Chitrolekha's case*², this Court reiterated that the caste is relevant in ascertaining the backwardness of a class. Further it was observed therein

"While this Court has not excluded caste from ascertaining the backwardness of a class of citizens, it has not made it one of the compelling circumstances affording a basis for the ascertainment of backwardness of a class. To put it differently the authority concerned may take caste into consideration in ascertaining the backwardness of a group of persons, but, if it does not, its order will not be bad on that account, if it can ascertain the backwardness of a group of persons on the basis of other relevant criteria."

24 The same view was expressed by this Court in *State of Andhra Pradesh and another v P Sagar*³. Therein it was observed

1 (1963) 1 S.C.R. (Supp.) 439

2 (1964) 6 S.C.R. 368

3 (1968) 3 S.C.R. 595 (1968) 2 S.C.J. 778
(1968) 2 An.W.R. (S.C.) 114 (1968) 2 M.L.J. (S.C.) 114

"In the context in which it occurs the expression 'class' means a homogeneous section of the people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. In determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determination of a class a test solely based upon the caste or community cannot also be accepted."

25. A caste has always been recognized as a class. In construing the expression "classes of His Majesty's subject" found in section 153-A of the Indian Penal Code, Wassoodew, J., observed in *Narayan Vasudev v. Emperor*¹:

"In my opinion, the expression "classes of His Majesty's subjects" in section 153-A of the Code is used in restrictive sense as denoting a collection of individuals or groups bearing a common and exclusive designation and also possessing common and exclusive characteristics which may be associated with their origin, race or religion, and that the term 'class' within that section carries with it the idea of numerical strength so large as could be grouped in a single homogeneous community."

26. In Paragraph 10, Chapter V of the Backward Classes Commission's Report, it is observed:

"We tried to avoid but we find it difficult to ignore caste in the present prevailing conditions. We wish it were easy to dissociate caste from social backwardness at the present juncture. In modern time anybody can take to any profession. The Brahman taking to tailoring, does not become a tailor by caste, nor is his social status lowered as a Brahman. A Brahman may be a seller of boots and shoes, and yet his social status is not lowered thereby. Social backwardness, therefore, is not today due to the particular profession of a person, but we cannot escape caste in considering the social backwardness in India."

27. In Paragraph 11 of that Report it is stated:

"It is not wrong to assume that social backwardness has largely contributed to the educational backwardness of a large number of social groups."

28. Finally in Paragraph 13, the committee concludes with following observations:

"All this goes to prove that social backwardness is mainly based on racial, tribal, caste and denominational differences."

29. The validity of the impugned list of backward classes came up for consideration before this Court in *Rajendran's case*¹, and this is what this Court observed therein:

"The contention is that the list of socially and educationally backward classes for whom reservation is made under rule 5, nothing but a list of certain castes. Therefore, reservation in favour of certain castes based only on caste considerations violates Article 15 (1), which prohibits discrimination on the ground of caste only. Now if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15 (1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15 (4)".

30. *Rajendran's case*¹, is an authority for the proposition that the classification of backward classes on the basis of castes is within the purview of Article 15 (4) if those castes are shown to be socially and educationally backward. No further material has been placed before us to show that the reservation for backward classes with which we are herein concerned is not in accordance with Article 15 (4). There is no gainsaying the fact that there are numerous castes in this country which are socially and educationally backward. To ignore their existence is to ignore the facts of life.

1. (1968) 2 S.C.R. 786 : (1968) 2 S.C.J. 801 : (1968) 2 M.L.J. (S.C.) 121 : (1968) 2 An.W.R. (S.C.) 121.

1. A.I.R. 1940 Bom. 379.

Hence we are unable to uphold the contention that the impugned reservation is not in accordance with Article 15 (4). But all the same the Government should not proceed on the basis that once a class is considered as a backward class it should continue to be backward class for all times. Such an approach would defeat the very purpose of the reservation because once a class reaches a stage of progress which some modern writers call as take off stage then competition is necessary for their future progress. The Government should always keep under review the question of reservation of seats and only the classes which are really socially and educationally backward should be allowed to have the benefit of reservation. Reservation of seats should not be allowed to become a vested interest. The fact that candidates of backward classes have secured about 50 per cent of the seats in the general pool does show that the time has come for a *de novo* comprehensive examination of the question. It must be remembered that the Government's decision in this regard is open to judicial review.

31 For the reasons mentioned above we are of opinion that the selections impugned in these petitions cannot be held to have been made validly inasmuch as the seats were distributed on unitwise basis and further that the interviews were not held in accordance with the rules. But despite coming to that conclusion we are unable to set aside the selections already made. The selected candidates have not been made parties to these petitions. They have already joined the course and are undergoing training. Their selection cannot be set aside without giving them an opportunity to put forward their case. It is true that the petitioners had filed applications to permit them to have recourse to Order 1, rule 8, Civil Procedure Code for the representation of the persons interested in opposing these applications but no order has been passed on those applications and it is now too late to have recourse to that procedure even if that procedure is permissible under law. We are told by the learned Advocate General of Tamil Nadu that 24 seats still remain to be filled up. He has assured us on behalf of the State that those seats will be filled

up in accordance with orders of this Court. There are about 80 persons, who we are told are in the waiting list. Some of the unsuccessful applicants had moved the High Court of Madras for relief similar to that sought by the petitioners herein. But it appears their writ petitions have been dismissed. Some out of them have intervened in these petitions. Other non-selected candidates have evinced no interest in challenging the selections made. Under the circumstances, it is reasonable to assume that they have abandoned their claim and it is too late for them to press their claim. Under these circumstances, after discussion with the Counsel for the parties we have come to the conclusion that these petitions should be allowed subject to the following conditions:

The State of Tamil Nadu shall immediately constitute a separate expert committee consisting of eminent medical practitioners (excluding all those who were members of the previous committees) for selection to the 24 unfilled seats. The selection shall be made on statewide basis. The committee shall interview only the candidates who are shown in the waiting list, the persons who unsuccessfully moved the High Court of Madras and the two petitioners before this Court. They shall allot separate marks under the five heads mentioned in the rule. The committee shall take into consideration only matters laid down in the rule, exclude from consideration all irrelevant matters and thereafter prepare a gradation list to fill up the 24 seats mentioned earlier. It is ordered accordingly. We think this is a fit case where the petitioners should get their costs from the State of Tamil Nadu.

V K

Petitions allowed

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—*M. Hidayatullah, C. J., J.M. Shelat, V. Bhargava, G.K. Mitter, C.A. Vaidialingam, A.N. Ray and I.D. Dua, JJ.*

Raj Narain ... Petitioner*

v.

Superintendent, Central Jail, New Delhi and another ... Respondents.

Criminal Procedure Code (V of 1898), section 344—Order of remand under, by a Magistrate—Challenge in Supreme Court by a writ of habeas corpus—Rule nisi issued by Supreme Court and custody of prisoner transferred to itself—Thereafter Magistrate extending period of remand without the prisoner being produced before him—Validity.

By majority.—There is nothing in the law which requires the personal presence of the prisoner before the Magistrate for the purpose of his remand under section 344, Criminal Procedure Code, because this is a rule of caution for Magistrates before granting remands at the instance of the police. However, even if it be desirable for the Magistrates to have the prisoner produced before them, when they recommit him to further custody, a Magistrate can act only as the circumstances permit. Where, as in the instant case, the prisoner's custody is transferred to the Supreme Court pending a writ petition filed by him challenging his remand, the Magistrate can only adjourn the case at the same time extending the period of remand. It is for the Supreme Court to see that the custody by it continues under proper orders and if the Supreme Court is satisfied that the prisoner is in proper custody under a proper order of remand, the prisoner will not be released. The Supreme Court does not order detention and cannot extend the remand. Its custody is continuous with the remand ordered by the Magistrate. If the Magistrate extends the period of remand and communicates the order to the person having immediate custody of the prisoner with intimation to the Supreme Court and the prisoner,

nothing more is expected of him. The object of production of the prisoner before the Magistrate is more than answered by his production before the Supreme Court because the prisoner has the protection of his interest transferred from the Magistrate to the Supreme Court. [Para. 8.]

Prisoners, who are under trial, are brought before the Supreme Court on rule nisi and are kept in custody of the Supreme Court. This is a transferred custody on behalf of the Magistrate. The Magistrate cannot recall the prisoner from the custody of the Supreme Court by his order and he is only required to intimate to the jail authorities, the prisoner and the Supreme Court that the original remand has been extended while adjourning the case. This is sufficient compliance with the requirements of the law in such special circumstances. [Para. 10.]

Per Shelat and Vaidialingam, JJ. (dissenting): It stands to reason that an order of remand will have to be passed in the presence of the accused. Otherwise the position will be that a Magistrate or Court will be passing orders of remand mechanically without having heard the accused for a considerably long time. If the accused is before the Magistrate when a remand order is being passed, he can make representations that no remand order should be passed and also oppose any move for a further remand. [Para. 40.]

The fact that the person concerned does not desire to be released on bail or that he can make written representations to the Magistrate are beside the point.

[Para. 40.]

Petition under Article 32 of the Constitution of India for a writ in the nature of *habeas corpus*.

D.P. Singh, Advocate of *M/s. Ramamurthi & Co.* for Petitioner.

ORDER.—By majority, we hold that the custody of Mr. Raj Narain is valid and that he is not entitled to release on his fresh petition. We shall give our reasons later.

The Judgments of the Court were delivered by:

Hidayatullah, C.J.—(On behalf of himself, *V. Bhargava, G.K. Mitter, A.N. Ray and I.D. Dua, JJ.*):—Mr. Raj Narain, M.P.,

*W.P. No. 330 of 1970.

1st/11th September, 1970.

was arrested on 20th August, 1970, under sections 107/117, Criminal Procedure Code, and was remanded to jail custody under warrant issued by the City Magistrate, Lucknow. A petition for a writ of *habeas corpus* for his release is pending in this Court, and under our orders, 22nd August, 1970, he has been transferred to Tihar Central Jail, Delhi. His original remand, as ordered by the City Magistrate, was till 28th August 1970.

2 On 28th August, 1970, we were informed at 4 P.M. that his remand would expire at midnight of the 28th August, 1970 and that the Superintendent, Central Jail, Delhi would not be able to detain Mr Raj Narain thereafter. The following intimation from the Superintendent was received in this connection by the Registry:

'Subject — Production of Shri Raj Narain, M.P. in the Supreme Court Writ Petition No. 315 of 1970

Sir,

I have the honour to state, that Shri Raj Narain, M.P. was received in this jail on transfer from District Jail, Lucknow, for production in Supreme Court in connection with his Writ Petition in the nature of *habeas corpus*. He was produced in the Court on 25th, 26th and 27th August, 1970. Now it has been ordered by the Supreme Court dated 27th August, 1970, that he is not to be produced in the Court and that he may be kept in Delhi. Orders of the Court are reproduced below:

Shri Raj Narain's petition is not to be listed tomorrow and he is not to be produced in Court tomorrow. He may however be kept in Delhi."

2 Judicial remand of Shri Raj Narain has been granted upto 28th August, 1970, by the City Magistrate and Magistrate, 1st Class, Lucknow, vide enclosure copy of the order dated 21st August, 1970. In other words his judicial remand expires today. You are, therefore, requested kindly to intimate whether Shri Raj Narain is to be kept in Delhi Jail after 28th August, 1970, as per your orders or his further judicial remand is to be taken from the said Court.

Clarification sought may kindly be given today per bearer.

Yours faithfully,"

The Court, thereupon, made the following order:

"It has been represented to us by the Superintendent of Jail that Mr Raj Narain's remand expires at midnight and that as he has been ordered to be kept in Delhi, it would be necessary for us to say in whose custody and under whose orders he has to be detained. A similar situation had arisen in the case of Mr Madhu Limaye when his remand expired and he became a free man, because we could not keep him under our orders in detention beyond the period originally fixed by the Magistrate. The same situation has arisen now and we can only make this order that he shall be remanded back to the custody to which he belongs and that he may be taken to U.P. if so desired, to be produced before us on the next date of hearing to be fixed in this case. If the fresh remand order is not received by the Superintendent of the Jail by midnight, the petitioner shall not be detained as directed by this Court, and he shall be set at liberty at midnight."

3 The same day a wireless message was received by the Superintendent, Tihar Central Jail from the District Magistrate, Lucknow. It stated:

"*Habeas corpus* Petition No. 315 of 1970 dated 28th March, 1970. Shri Raj Narain, M.P. remanded to further jail custody upto 1st September, (1st September, 1970) under orders of City Magistrate Lucknow dated 28th August, 1970. Note in the Jail Warrant and inform him."

4 The following day the message was corrected to read September, tenth instead of September first. The City Magistrate, Lucknow also telegraphed to the Superintendent, Tihar Central Jail, the following message:

"Reference *Habeas corpus* Petition No. 315 of 1970 dated 28th August, 1970 Time (sic) (Time Six?) P.M. Shri Raj Narain, M.P. remanded to further

jail custody upto September Ten, Nineteen Seventy. Note in the jail warrant and inform him."

Simultaneously this Court was informed by District Magistrate that remand of Mr. Raj Narain, M.P. was extended to 10th September, 1970, by the City Magistrate.

5. Mr. Rajnarain made an application in the nature of a *habeas corpus* petition stating that the remand orders were communicated to him on the morning of the 29th and therefore his detention after midnight of 28th was illegal and unsupported by any order of remand. Further, that in any case, as he was remanded behind his back, his remand is illegal and he is entitled to be released. The question is whether the custody of Mr. Raj Narain became illegal at midnight of 28th August, 1970. In our opinion it did not.

6. Mr. Raj Narain's counsel relied upon the case reported in *In re Venkataraman*¹, where it was held that an illegality was committed by a Magistrate in remanding a prisoner without having him before him and asking him whether he wished anybody to represent him and giving him an opportunity of showing cause why he should not be further remanded. The ruling restates, what was said in an old case reported in *Anonymous*², where it was ruled that just as commitment required the presence of a prisoner, so did recommitment. The earlier case contains no discussion and its opinion stated on a reference by the Magistrate.

7. In *Ram Narain Singh v. State of Delhi*³, it was ruled that an adjournment required an order in writing and so did an order of remand. The case dealt with an adjournment under section 344 of the Code of Criminal Procedure and as there was nothing to show that the Magistrate had made an order remanding the prisoner to custody, the detention was held to have become illegal. In that case the last order by the Magistrate adjourning the case, was made on 9th

March, 1953, but there was no order of remand. The only order was an endorsement on the warrant "Remanded to Judicial (sic) till 11th March, 1953". This warrant was not produced earlier and there was nothing on the Court's record to show an order of remand. All that the Court had done was to adjourn the case. This Court refused to take notice of the warrant produced after the Court rose for the day because it was not produced earlier and there was no order on the Court's record showing a remand. The detenues were, therefore, set at liberty.

8. The facts here are different from the case cited. Mr. Raj Narain did not want bail or seek to appear by counsel. He complained of nothing except his detention which he described as illegal for the *technical* reason that he was not produced before the Magistrate. If he wanted bail he could have asked us as he was in our custody. There is nothing in the law which required his personal presence before the Magistrate because that is a rule of caution for Magistrates before granting remands at the instance of the police. However, even if it be desirable for the Magistrates to have the prisoner produced before them, when they recommit him to further custody, a Magistrate can act only as the circumstances permit. Where the prisoner's custody is transferred to a superior Court such as this the Magistrate can only adjourn the case at the same time extending the period of remand. It is for this Court to see that the custody by it continues under proper orders and if this Court is satisfied that the prisoner is in proper custody under a proper order of remand, the prisoner will not be released. This Court does not order detention and cannot extend the remand. Its custody is continuous with the remand ordered by the Magistrate. If the Magistrate extends the period of remand and communicates the order to the person having the immediate custody of the prisoner with intimation to this Court and the prisoner, nothing more is expected of him. The object of production of the prisoner before the Magistrate is more than answered by his production before this Court because the prisoner has the protection of his interests transferred from the Magistrate to this Court.

1. I.L.R. (1948) Mad. 279 : (1947) 2 M.L.J. 202 : (1948) 49 Cr.L.J. 41.

2. (1867) 2 Weir 209.

3. (1953) S.C.R. 652 : (1953) S.C.J. 326.

9 There is no reason why we should order the release of Mr Raj Narain when we are satisfied that he is held on a proper remand by a Magistrate and there are no circumstances justifying release by us. To expect the Magistrate to do more under section 344 of the Code in such circumstances is to expect an impossibility from him and the law does not contemplate an impossibility. Indeed, similarly courts trying cases may find it necessary to order a remand in the absence of an accused, *e.g.*, when an accused is so seriously ill that the trial has to be adjourned and he cannot be brought to Court and in such case the order made without production of accused in Court will not be invalid.

10 Prisoners who are under trial, are brought before this Court on rule *nisi* and are kept in custody of this Court. This is a transferred custody on behalf of the Magistrate. The Magistrate cannot recall the prisoner from our custody by his order and he is only required to intimate to the jail authorities, the prisoner and this Court that the original remand has been extended while adjourning the case. This is sufficient compliance with the requirements of law in such special circumstances.

11 It was for these reasons that we held the present custody to Mr Raj Narain pending the decisions of his main petition to be proper and rejected the application for his instant release.

Vaidialingam, J —(On behalf of *Shelat, J*, and himself) —We regret our inability to agree with the order just pronounced by the learned Chief Justice with regard to the validity of the remand order dated 28th August, 1970, in question. We now proceed to give our reasons for such disagreement.

13 In this petition for *habeas corpus* the petitioner prays for immediate release on the ground that the remand order dated 28th August, 1970, passed by the City Magistrate, Lucknow is invalid and that his detention after the midnight of the 28th August 1970, is illegal. He further attacks his detention on the ground that it is contrary to the directions given by this Court on 28th August, 1970, in Writ Petition No 315 of 1970.

14 The circumstances leading to the filing of the present petition may be briefly stated thus. The petitioner has already filed a Writ Petition No 315 of 1970 for *habeas corpus* challenging his arrest on 20th August, 1970, and his detention in the District Jail, Lucknow. He raised various grounds against the legality of his arrest and detention and prayed for being released forthwith. He also prayed for striking down certain sections of the Criminal Procedure Code as violative of the Constitution. The City Magistrate, Lucknow in his counter-affidavit has stated that he had issued the warrant for the arrest of the petitioner under sections 107 and 112, Criminal Procedure Code, and that when the petitioner was produced before him on 20th August, 1970 at 9 A.M. he orally explained to the petitioner the contents of the notice under section 112, Criminal Procedure Code, a copy of which had already been served on him, and that the petitioner filed a lengthy reply thereto. It is further stated by the City Magistrate that as the petitioner did not make any application for being released on bail during pendency of the inquiry, he was remanded to jail. The City Magistrate has also maintained that the proceedings initiated against the petitioner are legal and valid and the provisions of the Criminal Procedure Code challenged by the petitioner are also valid. The contentions raised by the parties in this writ petition are pending adjudication by this Court. But it may be stated that the order of remand passed on 20th August, 1970, was effective till 28th August, 1970.

15 In Writ Petition No 315 of 1970 the petitioner impleaded the State of Uttar Pradesh the District Magistrate, Lucknow, the Superintendent, District Jail, Lucknow and the Union of India as respondents. On 21st August, 1970, when the said writ petition came up for preliminary hearing this Court directed "issue of rule *nisi* returnable on 25th August, 1970" and further ordered that the petitioner was to be produced before the Court on that day. The petitioner accordingly was transferred from the District Jail Lucknow, to the Central Jail, New Delhi for being produced before this Court. He was produced in this Court on the 25th, 26th and 27th August,

1970. On 27th August, 1970, this Court passed the following order :

“Shri Raj Narain’s petition is not to be listed tomorrow and he is not to be produced in Court tomorrow. He may, however, be kept in Delhi.”

16. Though the State of Uttar Pradesh appeared before us through Counsel on 27th August, 1970, when the above order was passed, it was not brought to our notice that the remand order passed by the City Magistrate, Lucknow, on 20th August, 1970, was expiring by midnight of 28th August, 1970, nor were any directions in that connection sought for from this Court at that time. It was only on 28th August, 1970, at 4 P.M. when the Court was about to rise for the day that a letter of the Superintendent, Central Jail, New Delhi of the same date, received by the Assistant Registrar of this Court, seeking directions regarding detention of the petitioner, was brought to our notice. That letter has been set out by the learned Chief Justice in his order. It is clear from that letter that the judicial remand of the petitioner ordered by the City Magistrate, Lucknow would expire on that day and orders were solicited whether the petitioner is to be detained further under orders of this Court or whether his further judicial remand is to be taken from the City Magistrate, Lucknow.

17. When a person under detention has come with a grievance that his detention is illegal and invalid and seeks a writ of *habeas corpus* and is produced before this Court, the prisoner comes directly under the custody of this Court. But no orders would be passed by this Court which would have the effect of detaining a prisoner beyond the period of detention already ordered and which order is complained off. In an appropriate case, during the operation of the detention order under challenge, this Court may release the prisoner on bail or otherwise either with or without conditions, pending adjudication of his grievance by this Court.

18. On the letter of 28th August, 1970, of the Superintendent, Central Jail, New Delhi, this Court made an order on the same day which has been set out in full in the order of the learned Chief Justice.

From that order the following points emerge :

(i) Mr. Raj Narain was remanded to the custody to which he belongs, namely, the U.P. authorities ;

(ii) The U.P. authorities were at liberty to take the petitioner to Lucknow pending fixation of the further date for the hearing of his writ petition.

(iii) If the Superintendent of the Central Jail, New Delhi, does not receive the fresh order of remand by midnight of 28th August, 1970, the petitioner should not be detained as directed by this Court and that he should be set at liberty at midnight.

19. At this stage it may be stated that if the respondents in Writ Petition No. 315 of 1970, who were represented by counsel, had brought to our notice on 27th August, 1970 (when this Writ Petition was adjourned to a later date) that the remand order of the City Magistrate was expiring on 28th August, 1970, and had sought directions, this Court would have, on that date itself, passed an order similar to the one, which was actually passed in the evening of 28th August, 1970. In that case the respondents would have had ample opportunity to take the petitioner to Lucknow, for producing him before the City Magistrate for a further order of remand, if he considered it necessary.

20. However, the position is that the petitioner was not taken to Lucknow nor produced before the City Magistrate. Instead, he was kept in the Central Jail, New Delhi. The City Magistrate, Lucknow, passed two orders, *viz.*, one on 28th August, 1970, and another on 29th August, 1970. Both the orders have been quoted in the order of the learned Chief Justice. By the first order, which is stated to have been communicated by wireless message, the petitioner was remanded to further jail custody upto 1st September, 1970. By the second order which was communicated by telegram, he was remanded to further jail custody upto 10th September, 1970.

21. The petitioner has in the present writ petition prayed for the issue of a writ of *habeas corpus* directing his release on the ground that his further

detention is illegal. He has attacked his detention after midnight of 28th August, 1970, as illegal and contrary to the directions given by this Court. He has stated that no orders of remand were communicated to him before midnight of 28th August, 1970, and that the two remand orders are quite inconsistent with each other. The more serious ground of challenge in respect of the remand orders is that they are illegal as they have been passed by the City Magistrate without his being produced before the City Magistrate and behind his back.

22 On 31st August, 1970, this Court issued a notice to the Superintendent, Central Jail, New Delhi, to produce before the Court on 1st September, 1970, the warrants under which 'Mr. Raj Narain is presently detained'. On 1st September, 1970, on behalf of the jail authorities, the wireless message received on 28th August, 1970 and the telegram of 29th August, 1970 were brought to our notice.

23 As we were inclined to hold that the remand orders had not been passed according to law and in consequence the further detention of the petitioner was illegal, this Court passed on the same day the following orders:

"By majority, we hold that the custody of Mr. Raj Narain is valid and that he is not entitled to release on his fresh petition. We shall give our reasons later."

24 The petitioner's grievance that the two orders passed by the City Magistrate on 28th and 29th August, 1970 are inconsistent, has considerable force. It is strange that a remand order extending the petitioner's custody upto 1st September, 1970, was followed within hours by another order extending it to a still further period up to 10th September, 1970. There is nothing to show why this became necessary. *Prima facie* it looks as if the Magistrate had not judiciously applied his mind on the question of how long the petitioner's custody should be extended. *Prima facie*, it would also show that the magistrate was passing an order of remand in a mechanical manner without even considering the period for which his remand orders are to have effect. This

certainly shows non-application of judicial mind even where the personal liberty of a citizen is involved.

25 But we are not prepared to rest our decision on the above circumstance alone. The petitioner has further stated in his petition that he received intimation only in the morning of 29th August, 1970 about the order of remand passed by the City Magistrate, Lucknow. If the City Magistrate was in law entitled to pass an order of remand on 28th August, 1970, without the person detained being produced before him, the mere fact that it was made known to the petitioner in the morning of 29th August, 1970 may not make the order of detention invalid. But we are upholding the contention of the petitioner that the City Magistrate had no power to pass an order of remand without the person in detention being produced before him, and as such the order passed on 28th August, 1970 is illegal, irrespective of the time as to when it was made known to the petitioner.

26 Now coming to the question of the legality of the order passed by the Magistrate remanding the petitioner in detention, without his being produced before him, it is necessary to refer to certain provisions of the Criminal Procedure Code. Such a question came up before this Court in *Tlalingdihama v. State of Assam*¹, but was not decided as it was not necessary in that case to do so.

27 The Criminal Procedure Code contemplates the period for which a person can be detained in custody prior to the commencement of an inquiry or trial and that is broadly divided into two stages. The first stage is the maximum period of 24 hours (See section 61, Criminal Procedure Code). For this period the police have the power to detain a person during investigation. Under Article 22 (2) of the Constitution, however, every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest excluding the time mentioned therein and no such person shall be detained in custody beyond the said period without the authority of the magis-

¹ WP No 171 of 1969 decided on 25th September 1969.

trate. If the investigation cannot be completed within 24 hours, the person arrested and detained in custody must be forwarded to the nearest magistrate as provided under section 167 (1), Criminal Procedure Code. Under section 167 (2), when an accused person is so forwarded, the magistrate, whether he has or has no jurisdiction to try the accused may authorise the detention of the accused in such custody as he thinks fit for a term not exceeding 15 days on the whole. This is the second stage of detention for 15 days. If the magistrate to whom the accused has been forwarded has no jurisdiction to try the case or commit it for trial, and if he considers further detention unnecessary, that magistrate has to forward the accused to the magistrate having such jurisdiction. Under section 167 (3) the magistrate authorising detention in the custody of the police is bound to record his reasons for so doing.

28. But the fact to be noted in section 167 (2) is, that the accused who is suspected or alleged to have committed an offence and who has to be tried by a Court has to be forwarded to the nearest magistrate whether he has jurisdiction to try the case or not. For the purpose of enabling the Police to complete the investigation, the magistrate before whom the accused is so produced has got power to authorise the detention of the accused for the maximum period mentioned therein. If the aforesaid magistrate considers further detention unnecessary, the accused has to be forwarded to the magistrate having jurisdiction. Before both the magistrates referred to in this sub-section, production of the accused is essential. And this is the position in respect of a person against whom the commission of an offence is alleged.

29. It may happen that the 15 days detention ordered under section 167 (2) is not found sufficient for completing the investigation. It could not have been contemplated by the Legislature that under such circumstances the arrested person must be released. Therefore it must have made provisions for continuing the arrested person's detention after 15 days in suitable cases, and there is no provision permitting further remand barring that contained in section 344, Criminal Procedure Code. We have already

referred to the fact that the City Magistrate has in his counter-affidavit in Writ Petition No. 315 of 1970 stated that the petitioner did not offer any bail during the pendency of the inquiry in which case section 344 squarely applies. Section 170, Criminal Procedure Code, also refers to the accused under custody being forwarded to a magistrate empowered to take cognizance of the offence upon a police report. This section also insists upon the production of the accused before the magistrate.

30. A remand under section 344, Criminal Procedure Code, is to be distinguished from a remand under section 167 (2), Criminal Procedure Code. Section 344 is more general than section 167 (2). But section 344 itself contains the limitations for passing an order of remand under that provision. Section 344 gives power to the Court to postpone or adjourn the inquiry or trial under the circumstances and in the manner indicated therein. The first proviso to section 344 states that no magistrate shall remand an accused person to custody under that section for a term exceeding 15 days at a time. The accused is entitled to participate in the inquiry or trial and he will be present before the Court concerned and it is in his presence that the order of remand under the first proviso will be made by the Court or magistrate concerned. The accused being present at the inquiry or trial before a magistrate or Court, in our opinion, it is implicit in section 344 that the order of remand under the first proviso has to be made in his presence.

31. The matter can be considered from another aspect. We have already stated that even in respect of any accused who is alleged to have committed an offence and with reference to which offence investigation is being conducted by the police, the production of the accused before the magistrates mentioned in section 167 (2), Criminal Procedure Code, is absolutely essential for the purpose of the police obtaining the necessary orders for detaining the accused, beyond the period of 24 hours referred to in section 61, Criminal Procedure Code. Under section 344, Criminal Procedure Code, which deals with inquiry or trial in respect of an offence alleged to have been committed

by an accused, the remand order under the proviso is to be passed in the presence of the accused. In this case even according to the averments made by the City Magistrate in his counter affidavit in Writ Petition No 315 of 1970 the petitioner had been arrested on the basis of a warrant issued by him under sections 107 and 112, Criminal Procedure Code and that the petitioner did not offer to be released on bail pending the inquiry. A reading of section 107, Criminal Procedure Code, will clearly show that the inquiry referred to by the City Magistrate with reference to the petitioner is not in respect of an offence alleged to have been committed already, but is only for the purpose of deciding whether action is to be taken for prevention of the offence referred to therein. When an accused who is alleged to have committed a crime has to be produced, before the magistrate when an order of remand is passed under section 344, Criminal Procedure Code, in our opinion, it stands to reason that a person who has not committed any offence but is only sought to be proceeded against under Chapter VIII, Criminal Procedure Code, and is proposed to be detained, must be before the Court at the time when the latter passes an order of remand under section 344, Criminal Procedure Code.

32 We will now refer to the case law on this aspect. In (1867) 2 Wears 409 the Madras High Court had to answer a reference made by a magistrate whether a person has to be placed before a magistrate on each occasion of fresh remand being given. The names of the parties are not given in the Report. In High Court proceeding dated 10th June, 1867 it is stated as follows:

"The High Court observe that to remand is to re-commit to custody and that a magisterial commitment requiring the presence of the prisoner, the recommitment of the prisoner also requires that presence."

33 This decision was given under section 344 of the Criminal Procedure Code as it then stood.

34 In *Crown v. Shera and others*¹, it was held that it was illegal to remand a

person on the application of the police when the prisoner is not produced in Court.

35 In *Re M R Venkataraman and others*¹ a Division Bench of the Madras High Court had to consider the legality of a remand order passed by the magistrate under sections 167 and 344, Criminal Procedure Code, without the prisoners having been produced before him. In dealing with this question the High Court observes at page 281 as follows:

"It does seem certain that an illegality was committed by the Magistrate in issuing an order of remand without having the prisoners produced before him and asking them whether they wished anybody to represent their cause and giving them an opportunity of showing cause why they should not be further remanded. We trust that the Sub-Magistrate issued this order through oversight and because as he later said, the prisoners were at Trichunopoly and he did not have much notice that a request for a further remand would be made. However that may be, we agree with the learned Counsel for the petitioners that an illegality involving a breach of the provisions of the Criminal Procedure Code was committed, and we trust that our order will serve as a warning to the Magistrate not to repeat this illegality."

36 In *Ram Narayan Singh v. The State of Delhi and others*², this Court had to deal with the validity of the detention of an accused. Even at the outset we may state that in that decision, this Court was dealing with a case where no order of the magistrate remanding the accused to custody was placed before this Court. Therefore on facts that case stands on a different footing, but the principle laid down by that decision, in our opinion, is apposite. At page 654 this Court observes as follows:

"This Court has often reiterated before that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they

¹ I.L.R. (1948) Mad 279 (1947) 2 M.L.J. 202.

² (1953) S.C.R. 652 (1953) S.C.J. 326

conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law."

37. It will be noted that this Court has emphasised that when the personal liberty of a person is sought to be restricted or curtailed, rules of that law as well as the forms must be scrupulously observed.

38. More recently the Delhi High Court in the decision reported in *Ram Rishi Anal v. Delhi Administration, Delhi and others*¹, had to deal with the legality of an order of remand passed by the magistrates without the accused being produced before them. There were certain other illegalities pointed out in that judgment. The learned Chief Justice has held in that decision that passing of remand order behind the back of an accused, is illegal. In the judgment of the Delhi High Court there is no reference to the decisions cited by us earlier except the decision of this Court in *Ram Narain Singh v. The State of Delhi and others*².

39. From the decision of this Court, referred to above, it is clear that the authorities seeking to curtail the liberty of a subject must strictly and scrupulously observe the forms and rules of the law. The various provisions of the Criminal Procedure Code, referred to by us, as also the decisions quoted above lead to the conclusion that the accused must be present before the magistrate or Court when an order of remand is passed. In fact the decisions quoted by us clearly lay down that an order of remand passed without the accused being produced, is illegal. We are in agreement with those decisions.

40. It stands to reason that an order of remand will have to be passed in the presence of the accused. Otherwise the position will be that a magistrate or Court will be passing orders of remand mechanically without having heard the accused for a considerably long time. If the accused is before the magistrate when a remand order is being passed, he can make representations that no remand order should be passed and also oppose any move for a further remand. For

instance he may rely upon the inordinate delay that is being caused by the prosecution in the matter and he can attempt to satisfy the Court that no further remand should be allowed. Again it may be that an accused, on a former occasion may have declined to execute a bond for getting himself released; but on a later occasion when a further remand is being considered, the accused may have reconsidered the position and may be willing to execute bond, in which case a remand order will be totally unnecessary. The fact that the person concerned does not desire to be released on bail or that he can make written representations to the magistrate are, in our opinion, beside the point. For instance, in cases where a person is sought to be proceeded against under Chapter VIII of the Criminal Procedure Code, it would be open to him to represent that circumstances have materially changed and a further remand has become unnecessary. Such an opportunity to make a representation is denied to a person concerned by his not being produced before the magistrate. As the magistrate has to apply his judicial mind, he himself can take note of all relevant circumstances when the person detained is produced before him and decide whether a further remand is necessary. All these opportunities will be denied to an accused person if he is not produced before the magistrate or the Court when orders of remand are being passed.

41. It is no answer that the petitioner was brought to New Delhi under the orders of this Court and hence the City Magistrate had to pass the remand order at Lucknow. We have already mentioned that no representation was, made nor any directions asked on 27th August, 1970, on behalf of the respondents when Writ Petition No. 315 of 1970 was adjourned. Under orders of 28th August, 1970, this Court released the petitioner from its custody and restored him to the original custody and even permitted him to be taken to Lucknow, pending fixation of a fresh date of hearing of his case. The Uttar Pradesh authorities concerned did not avail themselves of the opportunity to take him back to Lucknow for being produced before the magistrate concerned. On the other hand, they were

1. (1967) Delhi Law Times 126.

2. (1953) S.C.R. 652 : (1953) S.C.J. 326.

content to have an order of remand of the prisoner in New Delhi passed by the magistrate sitting in Lucknow. Such an order, as we have held, is illegal and hence the detention of the petitioner on the authority of such an illegal order of remand is also illegal. Such a situation has been brought by the Uttar Pradesh authorities for which they have to thank themselves.

42 In the result we hold that the orders of remand dated 28th and 29th August, 1970 passed by the City Magistrate, Lucknow, are illegal. We further hold that the detention of the petitioner in the Central Jail, New Delhi, after the midnight of 28th August, 1970 on the authority of the illegal orders of remand is also illegal. In consequence the petitioner should be set at liberty forthwith. The writ petition is allowed.

V K ——— Petition dismissed

THE SUPREME COURT OF INDIA (Original Jurisdiction)

PRESENT —M. Hidayatullah, C. J.,
J. M. Shelat, G. K. Mitter, C. A. Vaidya-
lingam and A. N. Ray, JJ.

K. A. Abbas ————— Petitioner*

v

The Union of India and another
Respondents

(A) Cinematograph Act (XXXVII of 1952) as amended by Act (III of 1959), section 5-B (2) —Constitution of India (1950), Articles 14 and 19 (1) (a) —Treatment of motion picture differently from other forms of art and classifying them into 'U' films and A films —Validity —Censorship if justified under our Constitution

It has been almost universally recognised that the treatment of motion pictures must be different from that of other forms of art and expression. This arises from the instant appeal of the motion picture, its versatility, realism (often surrealism), and its co-ordination of the visual and aural senses. The art of the cameraman, with trick photography, vistavision and three dimensional representation thrown in, has made the

cinema picture more true to life than even the theatre or indeed any other form of representative art. The motion picture is able to stir up emotions more deeply than any other product of art. Its effect particularly on children and adolescents is very great since their immaturity makes them more willingly suspend their disbelief than mature men and women. They also remember the action in the picture and try to emulate or imitate what they have seen. Therefore, classification of films into two categories of 'U' films and 'A' films is a reasonable classification. It is also for this reason that motion pictures must be regarded differently from other forms of speech and expression. A person reading a book or other writing or hearing a speech or viewing a painting or sculpture is not so deeply stirred as by seeing a motion picture. Therefore the treatment of the latter on a different footing is also a valid classification. [Para 22]

Censorship in India (and pre-censorship is not different in quality) has full justification in the field of exhibition of cinema films. Censorship of film including prior restraint is justified under our Constitution. [Para 44]

(B) Cinematograph Act (XXXVII of 1952) as amended by Act (III of 1959), section 5-B (2) —Validity —Directions issued under by Central Government —If void for vagueness —"Void for vagueness" doctrine evolved by American Courts —Applicability in India —Flaw in the directions issued under section 5-B (2) and necessity for certain safeguards indicated

It cannot be said as an absolute principle that no law in India will be considered bad for sheer vagueness. There is ample authority for the proposition that a law affecting fundamental rights may be so considered. The real rule is that if a law is vague or appears to be so, the Court must try to construe it, as far as may be, and language permitting the construction sought to be placed on it, must be in accordance with the intention of the Legislature. Thus if the law is open to diverse construction, that construction which accords best with the intention of the Legislature and advances the purpose of legislation is to be preferred. Where, however, the law admits of no such

* W P No 491 of 1969

24th September 1970

construction and the persons applying it are in a boundless sea of uncertainty and the law *prima facie* takes away a guaranteed freedom, the law must be held to offend the Constitution. This is not application of the doctrine of due process of the American Courts. The invalidity arises from the probability of the misuse of the law to the detriment of the individual. If possible, the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases. [Para. 49.]

Judging the directions issued by the Central Government under section 5-B (2) from this angle, they cannot be said to be vague at all. The general principles which are stated in the directions seek to do no more than restate the permissible restrictions as stated in clause (2) of Article 19 of the Constitution and section 5-B (1) of the Cinematograph Act.

[Para. 50.]

But what appears to be the real flaw in the scheme of the directions is a total absence of any direction which would tend to preserve art and promote it. The artistic appeal or presentation of an episode robs it of its vulgarity and harm and this appears to be completely forgotten. Neither the Parliament nor the Central Government has separated the artistic and the socially valuable from that which is deliberately indecent, obscene, horrifying or corrupting. They have not indicated the need of society and the freedom of the individual. They have thought more of the depraved and less of the ordinary moral man.

[Paras. 51 & 54.]

Thus, although the directions are not defective in so far as they go, directions to emphasize the importance of art need be included.

[Para. 55.]

Further certain safeguards, such as fixing a time-limit for the decision of the authorities censuring the films and providing for an appeal to a Court or to an independent tribunal and not to the Central Government as is done in section 5-C, should be introduced. (The need for these procedural safeguards was conceded by the Solicitor-General who stated that Government would set on foot

legislation to effectuate them at the earliest possible opportunity.) [Para. 9.]

Petition under Article 32 of the Constitution of India for enforcement of the Fundamental Rights.

R. K. Garg, D. P. Singh and S. C. Agarwala, Advocates of *M/s. Ramamurthi & Co.*, and *R. K. Jain, V. J. Francis and Miss. S. Chakravarti*, Advocates, for Petitioner.

Niren De, Attorney-General for India and *Jagadish Swarup*, Solicitor-General of India (*J. M. Mukhi, R. N. Sachthey and B. D. Sharma*, Advocates, with them), for Respondents.

The Judgment of the Court was delivered by

Hidayatullah, C.J.—This petition seeks a declaration against the Union of India and the Chairman, Central Board of Film Censors, that the provisions of Part II of the Cinematograph Act, 1952 together with the rules prescribed by the Central Government, 6th February, 1960, in the purported exercise of its powers under section 5-B of the Act are unconstitutional and void. As a consequence the petitioner asks for a writ of *mandamus* or any other appropriate writ, direction or order quashing the direction contained in a letter (Annexure X) dated 3rd July, 1969 for deletion of certain shorts from a documentary film entitled 'A Tale of Four Cities' produced by him for unrestricted public exhibition.

2. The petitioner is a journalist, playwright and writer of short stories. He is also a producer and director of cinematograph films. He was a member of the Enquiry Committee on Film Censorship (1968) and is a member of the Children's Film Committee. He has produced and/or directed many films some of which have been well-received here and abroad and even won awards and prizes.

3. The petitioner produced in 1968 a documentary film in 2 reels (running time 16 minutes) called a Tale of Four Cities. In this film he purported to contrast the luxurious life of the rich in the four cities of Calcutta, Bombay, Madras and Delhi, with the squalor and poverty of the poor, particularly those whose hands and labour help to build

beautiful cities, factories and other industrial complexes. The film is in black and white and is silent except for a song which the labourers sing while doing work and some background music and sounds for stage effect. The film, in motion sequences or still shots shows contrasting scenes of palatial buildings, hotels and factories—evidence of the prosperity of a few, and shanties, huts and slums—evidence of poverty of the masses. These scenes alternate and in between are other scenes showing sweating labourers working to build the former and those showing the squalid private life of these labourers. Some shots mix people riding in lush motor-cars with rickshaw and handcart pullers of Calcutta and Madras. In one scene a fat and prosperous customer is shown riding a rickshaw which a decrepit man pulls, sweating and panting hard. In a contrasting scene the same rickshaw puller is shown sitting in the rickshaw, pulled by his former customer. This scene is the epitomisation of the theme of the film and on view are the statues of the leaders of Indian Freedom Movement looking impotently from their high pedestals in front of palatial buildings, on the poverty of the masses. On the boulevards the rich drive past in limousines while the poor pull rickshaw or handcarts or stumble along.

4 There is included also a scanning shot of a very short duration, much blurred by the movement of the photographer's camera in which the red light district of Bombay is shown with the inmates of the brothels waiting at the doors or windows. Some of them wear abbreviated skirts showing bare legs up to the knees and sometimes a short way above them. This scene was perhaps shot from a moving car because the picture is unsteady on the screen and under exposed. Sometimes the inmates, becoming aware of the photographer, quickly withdraw themselves. The whole scene barely lasts a minute. Then we see one of the inmates shutting a window and afterwards we see the hands of a woman holding some currency notes and a male hand plucking away most of them leaving only a very few in the hands of the female. The two actors are not shown. The suggestion in the first scene is that a

customer is being entertained behind closed shutters and in the next sequence that the amount received is being shared between the pimp and the prostitute, the former taking almost the whole of the money. The sequence continues and for the first time the woman who shut the window (is) again seen. She sits at the dressing table, combs her hair, glances at two love birds in a cage and looks around the room as if it were a cage. Then she goes behind the screen and emerges in other clothes and prepares for bed. She sleeps and dreams of her life before she took the present path. The film then passes on to its previous theme of contrasts mentioned above, often repeating the earlier shots in juxtaposition as stills. There is nothing else in the film to be noticed either by us or by the public for which it is intended.

5 The petitioner applied to the Board of Film Censors for a 'U' certificate for unrestricted exhibition of the film. He received a letter (30th December, 1968) by which the Regional Officer informed him that the Examining Committee and the Board had *provisionally* come to the conclusion that the film was not suitable for unrestricted public exhibition but was suitable for exhibition restricted to adults. He was given a chance to make representations against the tentative decision within 14 days. Later he was informed that the Revising Committee had reached the same conclusion. He represented by letter (18th February, 1969) explaining the purpose of the film as exposing the exploitation of man (or woman) by man and the contrast between the very rich few and the very poor masses. He claimed that there was no obscenity in the film. He was informed by a letter (26th February, 1969) that the Board did not see any reason to alter its decision and the petitioner could appeal within 30 days to the Central Government. The petitioner appealed the very next day. On 3rd July, 1969 the Central Government decided to give a 'U' certificate provided the following cuts were made in the film.

"Shorten the scene of women in the red light district, deleting specially the shot showing the closing of the window by the lady, the suggestive

shots of bare knees and the passing of the currency notes." Dir. IC (iii) (b) (c); IV."

The mystery of the code numbers at the end was explained by a letter on 23rd July, 1969 to mean this :

"I. It is not desirable that a film shall be certified as suitable for public exhibition, either unrestricted or restricted to adults which

* * * * *

G (iii) (b) and (c) deals with the relations between the sexes in such a manner as to depict immoral traffic in women and soliciting, prostitution or procuration.

IV. It is undesirable that a certificate for unrestricted public exhibition shall be granted in respect of a film depicting a story, or containing incidents unsuitable for young persons."

The petitioner then filed this petition claiming that his fundamental right of free speech and expression was denied by the order of the Central Government. He claimed a 'U' certificate for the film as of right.

6. Before the hearing commenced the film was specially screened for us. The lawyers of both sides (including the Attorney-General) and the petitioner were also present. The case was then set down for hearing. The Solicitor General (who had not viewed the film) appeared at the hearing. We found it difficult to question him about the film and at our suggestion the Attorney-General appeared but stated that Government had decided to grant a 'U' certificate to the film without the cuts previously ordered.

7. The petitioner then asked to be allowed to amend the petition so as to be able to challenge pre-censorship itself as offensive to freedom of speech and expression and alternatively the provisions of the Act and the rules, orders and directions under the Act, as vague, arbitrary and indefinite. We allowed the application for amendment, for the petitioner was right in contending that a person who invests his capital in promoting or producing a film must

have clear guidance in advance in the matter of censorship of films even if the law of pre-censorship be not violative of the fundamental right.

8. When the matter came up for hearing the petitioner raised four points: (a) that pre-censorship itself cannot be tolerated under the freedom of speech and expression, (b) that even if it were a legitimate restraint on the freedom, it must be exercised on very definite principles which leave no room for arbitrary action, (c) that there must be a reasonable time-limit fixed for the decision of the authorities censoring the film, and (d) that the appeal should lie to a Court or to an independent tribunal and not the Central Government.

9. The Solicitor-General conceded (c) and (d) and stated that Government would set on foot legislation to effectuate them at the earliest possible opportunity: Since the petitioner felt satisfied with this assurance we did not go into the matter. But we must place on record that the respondents exhibited charts showing the time taken in the censorship of films during the last one year or so and we were satisfied that except in very rare cases the time taken could not be said to be unreasonable. We express our satisfaction that the Central Government will cease to perform curial functions through one of its Secretaries in this sensitive field involving the fundamental right of speech and expression. Experts sitting as a Tribunal and deciding matters quasi-judicially inspire more confidence than a Secretary and therefore it is better that the appeal should lie to a Court or tribunal.

10. This brings us to the remaining two questions. We take up first for consideration: whether pre-censorship by itself offends the freedom of speech and expression. Article 19 (1) (a) and (2) of the Constitution contain the guarantee of the right and the restraints that may be put upon that right by a law to be made by Parliament. They may be read here:

"19. *Protection of certain rights regarding freedom of speech, etc.*

(1) All citizens shall have the right—

(a) to freedom of speech and expression,

* * * * *

(2) Nothing in sub-clause (a) of clause (1) shall effect the operation of any existing law or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence."

The argument is that the freedom is absolute and precensorship is not permissible under the Constitution. It is submitted that precensorship is inconsistent with the right guaranteed. Now it is clear that some restraint is contemplated by the second clause and in the matter of censorship only two ways are open to Parliament to impose restrictions. One is to lay down in advance the standards for the observance of film producers and then to test each film produced against those standards by a preview of the film. The other is to let the producer observe those standards and make the infraction and offence and punish a producer who does not keep within the standards. The petitioner claims that the former offends the guaranteed freedom but reluctantly concedes the latter and relies upon the minority view expressed in the United States Supreme Court from time to time. The petitioner reinforces this argument by contending that there are other forms of speech and expression besides the films and none of them is subject to any prior restraint in the form of precensorship and claims equality of treatment with such other forms. He claims that there is no justification for a differential treatment. He contends next that even the standards laid down are unconstitutional for many reasons which we shall state in proper place.

11 This is the first case in which the censorship of films in general and precensorship in particular have been challenged in this Court and before we say

anything about the arguments, it is necessary to set down a few facts relating to censorship of films and how it works in India. The Government of India appointed a Committee on 28th March 1968 to enquire into the working of the existing procedures for certification of cinematograph films for public exhibition in India and allied matters, under the Chairmanship of G D Khosla, former Chief Justice of the Punjab High Court. The report of the Committee has since been published and contains a valuable summary of the law of censorship not only in India but also in foreign countries. It is hardly helpful to the determination of this case to go into this history but it may be mentioned here that it is the opinion of experts on the subject that Indian film censorship since our independence has become one of the strictest in the world. See *Film Censors and the Law* by Neville March Hunnings, page 227 and *Filmrecht ein Handbuch* of Berthold and von Hertleib (1957) page 215 quoted by Hunnings. In 1966 Mr Raj Bahadur (who succeeded Mrs Indira Gandhi as Minister for Information and Broadcasting) said that Government would 'continue a liberal censorship and was considering certain expert opinion on the subject. He also suggested to the film industry that it should formulate a code which would be the best from all standards so that Government may be guided by it in formulating directives to the censors. See *Journal of Film Industry*, 25th February, 1966, also quoted by Hunnings at page 18 of his book. This suggestion came to nothing for obvious reasons. Film industry in India is not even oligopolistic in character and it is useless to expect it to classify films according to their suitability, as is done in the United States by the Motion Picture Association of America (MPAA) founded in October 1968. There the film industry is controlled by eight major producers and private control of film making is possible with the assistance of the National Association of Theatre Owners and Film Importers and Distributors of America. Having no such organisation for private censorship or even a private body like the British Board of Film Censors in England, the task must be done by Government if censorship is at all to be imposed. Films began to be exhibited

in India at the turn of the last century and film censorship took birth in 1918 when the Cinematograph Act, 1918 (II of 1918), was passed. Two matters alone were then dealt with: (a) the licensing of cinema houses, and (b) the certifying of films for public exhibition. The censors had a wide discretion and no standards for their action were indicated. Board of Film Censors came into existence in the three Presidency towns and Rangoon. The Bombay Board drew up some instructions for Inspectors of Films and it copied the 43 rules formulated by T.P.O'Connor in England. These are more or less continued even today.

12. We do not wish to trace here the history of the development of film censorship in India. That task has been admirably performed by the Khosla Committee. Legislation in the shape of amendments of the Act of 1918 and a Production Code were the highlights of the progress. In 1952 a fresh consolidating Act was passed and it is Act XXXVII of 1952 (amended in 1959 by Act III of 1959) and that is the present statutory provision on the subject. It established a Board of Film Censors and provided for Advisory Panels at Regional Centres. Every person desiring to exhibit any film has to apply for a certificate and the Board after examining the film or having the film examined deals with it by

(a) sanctioning the film for unrestricted public exhibition;

(b) sanctioning the film for public exhibition restricted to adults;

(c) directing such excisions and modifications as it thinks fit, before sanctioning the film for unrestricted public exhibition or for public exhibition restricted to adults, as the case may be; or

(d) refusing to sanction the film for public exhibition.

The film producer is allowed to represent his views before action under (b), (c) and (d) is taken. The sanction under (a) is by granting a 'U' certificate and under (b) by an 'A' certificate and the certificates are valid for ten years.

13. The Act then lays down the principles for guidance and for appeals in

sections 5-B and 5-C respectively. These sections may be read here:

"5-B. Principles for guidance in certifying films :

(1) A film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or involves defamation or contempt of Court or is likely to incite the commission of any offence.

(2) Subject to the provisions contained in sub-section (1), the Central Government may issue such directions as it may think fit setting out the principles which shall guide the authority competent to grant certificates under this Act in sanctioning films for public exhibition."

"5-C. Appeals :

Any person applying for a certificate in respect of a film who is aggrieved by any order of the Board—

(a) refusing to grant a certificate, or
(b) granting only an "A" certificate; or

(c) directing the applicant to carry out any excisions or modifications;

may, within thirty days from the date of such order, appeal to the Central Government, and the Central Government may, after such inquiry into the matter as it considers necessary and after giving the appellant an opportunity for representing his views in the matter, make such order in relation thereto as it thinks fit."

By section 6, the Central Government has reserved a general revising power which may be exercised during the pendency of a film before the Board and even after it is certified. Under the latter part of this power the Central Government may cancel a certificate already granted or change the 'U' certificate into an 'A' certificate or may suspend for 2 months the exhibition of any film.

14. The above is the general scheme of the legislation on the subject omitting allied matters in which we are not interest-

ed in this case. It will be noticed that section 5-B (1) really reproduces clause (2) of Article 19 as it was before its amendment by the First Amendment. This fact has led to an argument which we shall notice presently. The second sub-section of section 5-B enables the Central Government to state the principles to guide the censoring authority, by using directions. In furtherance of this power the Central Government has given directions to the Board of Film Censors. They are divided into General Principles three in number, followed by directions for their application in what are called 'rules'. The part dealing with the application of the principles is divided into four sections and each section contains matters which may not be the subject of portrayal in films. We may quote the General Principles here:

"1. No picture shall be certified for public exhibition which will lower the moral standards of those who see it.

Hence, the sympathy of the audience shall not be thrown on the side of crime, wrong-doing, evil or sin.

2. Standards of life, having regard to the standards, of the country and the people to which the story relates shall not be so portrayed as to deprave the morality of the audience.

3. The prevailing laws shall not be so ridiculed as to create sympathy for violation of such laws."

The application of the General Principles is indicated in the four sections of the rules that follow so that a uniform standard may be applied by the different regional panels and Boards. The first section deals with films which are considered unsuitable for public exhibition. This section is divided into clauses A to F. Clause A deals with the delineation of crime, B with that of vice or immorality, C with that of relations between sexes, D with the exhibition of human form, E with the bringing into contempt of armed forces, or the public authorities entrusted with the administration of law and order and F with the protection of the susceptibilities of foreign nations and religious communities, with fomenting

social unrest or discontent to such an extent as to incite people to crime and promoting disorder, violence, a breach of law or disaffection or resistance to Government.

15. Clauses E and F are further explained by stating what is unsuitable and what is objectionable in relation to the topics under those clauses.

16. Section II then enumerates subjects which may be objectionable in a context in which either they amount to indecency, immorality, illegality or incitement to commit a breach of the law.

17. Section III then provides

"It is not proposed that certification of a film should be refused altogether, or that it should be certified as suitable for adult audiences only, where the deletion of a part or parts, will render it suitable for unrestricted public exhibition or for exhibition restricted to adults, and such deletion is made, unless the film is such as to deprave the majority of the audience and even excision will not cure the defects."

18. Section IV deals with the protection of young persons and enjoins refusal of a certificate for unrestricted public exhibition in respect of a film depicting a story or containing incidents unsuitable for young persons. Emphasis in this connection is laid in particular upon—

"(a) anything which may strike terror in a young person, e.g., scenes depicting ghosts, brutality, mutilations, torture, cruelty, etc.

(ii) anything tending to disrupt domestic harmony or the confidence of a child in its parents e.g., scenes depicting parents quarrelling violently, or one of them striking the other, or one or both of them behaving immorally,

(iii) anything tending to make a person of tender years insensitive to cruelty to others or to animals."

19. In dealing with crime under section I clause A, the glorification or extenuation of crime, depicting the *modus operandi* of criminals, enlisting admiration or sympathy for criminals, holding

up to contempt the forces of law against crime etc. are indicated as making the film unsuitable for exhibition. In Clause B similar directions are given with regard to vice and immoral acts and vicious and immoral persons. In Clause C the unsuitability arises from lowering the sacredness of the institution of marriage and depicting rape, seduction and criminal assaults on women, immoral traffic in women, soliciting, prostitution or procuration, illicit sexual relations, excessively passionate love scenes, indelicate sexual situations and scenes suggestive of immorality. In Clause D the exhibition of human form in nakedness or indecorously or suggestively dressed and indecorous and sensuous postures are condemned. In section II are mentioned confinements, details of surgical operations, venereal diseases and loathsome diseases like leprosy and sores, suicide or genocide, female under clothing, indecorous dancing, importunation of women, cruelty to children, torture of adults, brutal fighting, gruesome murders or scenes of strangulation, executions, mutilations and bleeding, cruelty to animals, drunkenness or drinking not essential to the theme of the story, traffic and use of drugs, class hatred, horrors of war, horror as a predominant element, scenes likely to afford information to the enemy in time of war, exploitation or tragic incidents of war, blackmail associated with immorality, intimate biological studies, crippled limbs or malformations, gross travesties of administration of justice and defamation of any living person.

20. We have covered almost the entire range of instructions. It will be noticed that the control is both thematic and episodic. If the theme offends the rules and either with or without excision of the offending parts, the film remains still offensive, the certificate is refused. If the excisions can remove its offensiveness, the film is granted a certificate. Certifiable films are classified according to their suitability for adults or young people. This is the essential working of censorship of motion pictures in our country.

21. The first question is whether the films need censorship at all? Pre-censorship is but an aspect of censorship and bears the same relationship in quality

to the material as censorship after the motion picture has had a run. The only difference is one of the stage at which the State interposes its regulations between the individual and his freedom. Beyond this there is no vital difference. That censorship is prevalent all the world over in some form or other and pre-censorship also plays a part where motion pictures are involved, shows the desirability of censorship in this field. The Khosla Committee has given a description generally of the regulations for censorship (including pre-censorship) obtaining in other countries and Hunning's book deals with these topics in detail separately for each country. The method changes, the rules are different and censorship is more strict in some places than in others, but censorship is universal. Indeed the petitioner himself pronounced strongly in favour of it in a paper entitled 'Creative Expression' written by him. This is what he said :

" But even if we believe that a novelist or a painter or a musician should be free to write, paint and compose music without the interference of the State machinery, I doubt if anyone will advocate the same freedom to be extended to the commercial exploitation of a powerful medium of expression and entertainment like the cinema. One can imagine the results if an unbridled commercial cinema is allowed to cater to the lowest common denominator of popular taste, specially in a country which, after two centuries of political and cultural domination, is still suffering from a confusion and debasement of cultural values.

Freedom of expression cannot, and should not, be interpreted as a licence for the cine-magnates to make money by pandering to, and thereby propagating, shoddy and vulgar taste."

22. Further it has been almost universally recognised that the treatment of motion pictures must be different from that of other forms of art and expression. This arises from the instant appeal of the motion picture, its versatility, realism (often surrealism), and its co-ordination of the visual and aural senses. The art of the cameraman, with trick photography, vista-vision and three dimensional representation thrown in, has made the cinema

picture more true to life than even the theatre or indeed any other form of representative art. The motion picture is able to stir up emotions more deeply than any other product of art. Its effect particularly on children and adolescents is very great since their immaturity makes them more willingly suspend their disbelief than mature men and women. They also remember the action in the picture and try to emulate or imitate what they have seen. Therefore, classification of films into two categories of 'U films and A films is a reasonable classification. It is also for this reason that motion pictures must be regarded differently from other forms of speech and expression. A person reading a book or other writing or hearing a speech or viewing a painting or sculpture is not so deeply stirred as by seeing a motion picture. Therefore the treatment of the latter on a different footing is also a valid classification.

23 The petitioner pressed for acceptance of the minority views expressed from time to time in the Supreme Court of the United States and it is, therefore, necessary to say a few words about censorship of motion pictures in America and the impact of the First Amendment guaranteeing freedom of speech and expression in that country. The leading cases in the United States are really very few but they are followed in a very large number of *per curiam* decisions in which, while concurring with the earlier opinion of the Court, there is sometimes a restatement with a difference. As early as 1914 in *Mutual Film Corporation v. Industrial Commission of Ohio*¹, Mr Justice Mc Kenna, speaking for the full Court, said that legislative power is not delegated unlawfully when a Board of Censors is set up to examine and censor, as a condition precedent to exhibition, motion picture films, to be publicly exhibited and displayed, with a view to passing and approving only such of them as are in the judgment of the board moral, educational or amusing and forbidding those that are not. Speaking of the criteria stated in general words it was said that general terms get "precision from the sense and experience of men and become certain and useful guides in reasoning and con-

duct". The first notice of change came in 1925 in *Gutlow v. New York*². When it was said that censorship had to pass the scrutiny of the First Amendment through the Fourteenth Amendment before speech and expression could be abridged by State laws. To this, was added in 1919 the test of clear and present danger propounded by Justice Holmes as the only basis for curtailing the freedom of speech and expression see *Schenck v. U.S.*³, and Justice Brandeis in *Whitney v. California*⁴, laid down three components of the test.

(a) There must be a clear and present danger that speech would produce a substantial evil that the State has power to prevent. This is not to say that it is enough if there is 'fear' there must be reasonable grounds to fear that serious evil would result from the exercise of speech and expression.

(b) There must be a 'present or 'imminent' danger and for this there must be reasonable grounds to hold this opinion and that no reasonable opportunity was available to avert the consequences, and

(c) The substantive evil to be prevented must be 'serious' before there can be a prohibition on freedom of speech and expression for the police power of the State could not be exercised to take away the guarantee to avert a relatively trivial harm to society.

24 In 1931 in *Near v. Minnesota*⁵, immunity of press from pre-censorship was denied but pre-censorship (as it is termed previously, restraint) was not to be unlimited. A major purpose of the First Amendment was to prevent prior restraint. The protection was not unlimited but put on the State the burden of showing that the limitation challenged in the case was exceptional.

25 In 1941 the Court handed down in *Chaplinsky v. New Hampshire*⁶, the opinion that free speech was not absolute at all times and in all circumstances, that there existed certain 'well-defined and narrowly limited classes of speech, the prevention and punishment of which had never been

1 (1925) 268 U.S. 652

2 (1919) 249 U.S. 47

3 (1927) 274 U.S. 357

4 (1931) 283 U.S. 697

5 (1941) 315 U.S. 567

thought to raise any constitutional problem."

26. This state of affairs continued also in respect of motion pictures and the regulation of their public exhibition. Real attention was focussed on censorship after 1951. The effect of World War II on American society was the real cause because people's notions of right and wrong from a social point of view drastically altered. Added to this were the inroads made by Justices Douglas and Black in *Dennis v. U.S.*¹, in the previously accepted propositions which according to them made the First Amendment no more than an admonition to Congress. In *Beauharnais v. Illinois*², Justice Douglas claimed for the freedom of speech, a preferred position because the provision was in absolute terms, an opinion which has since not been shared by the majority of the Court.

27. In 1951 there came the leading decision *Burstyn v. Wilson*³. This case firmly established that motion pictures were within the protection of the First Amendment through the Fourteenth. While recognising that there was no absolute freedom to exhibit every motion picture of every kind at all times and places, and that constitutional protection even against a prior restraint was not absolutely unlimited, limitation was said to be only in exceptional cases. It however laid down that censorship on free speech and expression was ordinarily to be condemned but the precise rules governing other methods of expression were not necessarily applicable.

28. The application of the 14th Amendment has now enabled the Court to interfere in all cases of State restrictions where censorship fails to follow due process. The result has led to a serious conflict in the accepted legal opinion. The Supreme Court has had to deal with numerous cases in which censorship was questioned.

29. The divergence of opinion in recent years has been very deep. Censorship of press art and literature is on the verge of extinction except in the ever shrinking

area of obscenity. In the field of censorship of the motion picture there has been a tendency to apply the 'void for vagueness' doctrine evolved under the due process clause. Thus regulations containing such words as 'obscene', 'indecent', 'immoral', 'prejudicial to the best interests of people', 'tending to corrupt morals', 'harmful' were considered vague criteria. In *Kingsley International Pictures Corporation v. Regents*¹, where the film *Lady Chatterley's Lover* was in question, certain opinions were expressed. These opinions formed the basis of the arguments on behalf of the petitioner. Justice Black considered that the Court was the worst of Board of Censors because they possessed no special expertise. Justice Frankfurter was of the opinion that "legislation must not be so vague, the language so loose, as to leave to those who have to apply it too wide a discretion for sweeping within its condemnation what was permissible expression as well as what society might permissibly prohibit, always remembering that the widest scope for freedom was to be given to the adventurous and imaginative exercise of human spirit . . .". Justice Douglas considered prior restraint as unconstitutional. According to him if a movie violated a valid law, the exhibitor could be prosecuted.

30. The only test that seemed to prevail was that of obscenity as propounded in *Roth v. United States*². In that three tests were laid down:

(a) that the dominant theme taken as a whole appeals to prurient interests according to the contemporary standards of the average man;

(b) that the motion picture is not saved by any redeeming social value; and

(c) that it is patently offensive because it is opposed to contemporary standards.

31. The Hicklin test in *Regina v. Hicklin*³, was not accepted.

32. Side by side procedural safeguards were also considered. The leading case is *Freedman v. Maryland*⁴, where the

1. (1959) 360 U.S. 684

2. (1957) 354 U.S. 476

3. L.R. (1868) 3 Q.B. 360.

4. (1965) 380 U.S. 51.

1. (1951) 341 U.S. 494.

2. (1952) 343 U.S. 250.

3. (1951) 343 U.S. 495.

Court listed the following requirements for a valid film statute

- 1 The burden of proving that the film is obscene rests on the censor
- 2 Final restraint (denial of licence) may only occur after judicial determination of the obscenity of the material
- 3 The censor will either issue the licence or go into Court himself for a restraining order
- 4 There must be only a 'brief period' between the censor's first consideration of film and final judicial determination (As summarized by Martin Shapiro *Freedom of Speech* The Supreme Court and Judicial Review)

These were further strengthened recently in *Tellet Film Corporation v Cusack*¹, (a *per curiam* decision) by saying that a non criminal process which required the prior submission of a film to a censor avoided constitutional infirmity only if censorship took place under procedural safeguards. The censorship system should therefore, have a time-limit. The censor must either pass the film or go to Court to restrain the showing of the film and the Court also must give a prompt decision. A delay of 50—57 days was considered too much. The statute in question there had meticulously laid down the time for each stage of examination but had not fixed any time limit for prompt judicial determination and thus proved fatal.

33 The fight against censorship was finally lost in the *Times Film Corporation v Chicago*², but only by the slender majority of one. Chief Justice Warren and Justice Black Douglas and Brennan dissented.

The views of these judges were pressed upon us. Chief Justice Warren thought that there ought to be first an exhibition of an allegedly 'obscene film' because Government could not forbid the exhibition of a film in advance. Thus prior restraint was said to be impermissible. Justice Douglas went further and said that censorship of movies was unconstitutional. Justice Clark on the other hand speaking for the majority, said

" It has never been held that liberty of speech is absolute. Nor has it been suggested that all previous restraints on speech are invalid.

* * * *

It is not for this Court to limit the State in its selection of the remedy it deems most effective to cope with such a problem, absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances.

The argument that exhibition of moving pictures ought in the first instance to be free and only a criminal prosecution should be the mode of restraint when found offensive was rejected. The pre-censorship involved was held to be no ground for striking down a law of censorship. The minority was of the opinion that a person producing a film must know what he was to do or not to do. For, if he were not sure he might avoid even the permissible.

34 In *Interstate Circuit Inc v Dallas*¹, certain expressions were considered vague including 'crime delinquency', 'sexual promiscuity', 'not suitable for young persons'. According to the Court the statute must state narrowly drawn, reasonably definite, standards for the Board to follow. Justice Harlan, however, observed that the Courts had not found any more precise expressions and more could not be demanded from the Legislature than could be said by the Court. However precision of regulation was to be the touchstone of censorship and while admitting that censorship was admissible, it was said that too wide a discretion should not be left to the censors.

35 Meanwhile in *Jacobellis v Ohio*², it was held that laws could legitimately aim specifically at preventing distribution of objectionable material to children and thus it approved of the system of age-classification. The *Interstate Circuit Inc v Dallas*¹, and *Ginsberg v New York*³, set the seal on validity of age-classification as constitutionally valid.

1 (1958) 390 U.S. 139

2 (1961) 365 U.S. 43

1 (1968) 390 U.S. 676

2 (1964) 378 U.S. 184

3 (1968) 390 U.S. 629

36. There are two cases which seem to lie outside the main-stream. Recently in *Stanley v. Georgia*¹, the Court seems to have gone back on the *Roth case*², and held that the right to receive information and ideas, *regardless of their social worth*, is also fundamental to society. Another exception can only be understood on the basis of the recognition of the needs of a permissive society. Thus *Mishkin v. New York*³, removes the test of the average person by saying that if the material is designed for a deviant sexual group, the material can only be censored if taken as a whole it appeals to the purient interest in sex of the members of that group. This is known as the selective-audience obscenity test and even children are a special class. See *Ginsberg v. New York*.⁴ On the whole, however, there is in this last case a return to the Hicklin test in that obscenity is considered even from isolated passages.

37. To summarize. The attitude of the Supreme Court of the United States is not as uniform as one could wish. It may be taken as settled that motion picture is considered a form of expression and entitled to protection of First Amendment. The view that it is only commercial and business and therefore, not entitled to the protection as was said in *Mutual Film Corporation*⁵, is not now accepted. It is settled that freedom of speech and expression admits of extremely narrow restraints in cases of clear and present danger, but included in the restraints are prior as well as subsequent restraints. The censorship should be based on precise statement of what may not be subject-matter of film-making and this should allow full liberty to the growth of art and literature. Age-classification is permissible and suitability for special audiences is not to depend on whether the average man would have considered the film suitable. Procedural safeguards as laid down in the *Freedom case*⁶, must also be observed. The film can only be censored if it offends in the manner set out in *Roth's case*.²

38. The petitioner put before us all these dicta for our acceptance and added to them the rejection of censorship particularly prior censorship by Chief Justice Warren and Justices Black and Douglas. He pointed out that in England too the censorship of the theatre has been abolished by the Theatres Act, 1968 (1968 C.54) and submitted that is the trend in advanced countries. He also brought to our notice the provisions of the Obscene Publications Act, 1959 (7 & 8 Eliz. 2 C. 66), where the test of obscenity is stated thus :

“ 1. *Test of obscenity.*

(1) For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

* * * * *

and the defence of public good is stated thus:

“ 4. *Defence of public good.*

(1) A person shall not be convicted of an offence against section two of this Act, and an order for forfeiture shall not be made under the foregoing section if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interest of science, literature, art or learning, or of other objects of general concern.

(2) It is hereby declared that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or to negative the said ground.”

He contended that we must follow the above provisions.

39. We may now consider the English practice. In England there was little freedom of speech to start with. The Common Law made no provision for it. The two constitutional documents—the Petition of Right (1628) and the Bill of Rights (1689)—do not mention it. By

1. (1969) 394 U.S. 557.
2. (1957) 354 U.S. 476.
3. (1966) 383 U.S. 592.
4. (1968) 390 U.S. 629.
5. (1915) 236 U.S. 230.
6. (1965) 380 U.S. 51.

the time of Queen Elizabeth I presses were controlled through licences and although they were granted no book, could be issued without the sanction of Government. The Star Chamber tried several cases of censorship and it even continued in the days of Cromwell. Milton was the first to attack censorship in his *Areopagitica* and that had profound effect on the freedom of speech. We find quotations from his writings in the opinions of Chief Justice Warren and Justice Douglas. Freedom of speech came to be recognised by slow stages and it was Blackstone who wrote in his *Commentaries* (Book IV, page 1517)—

‘The liberty of the Press is indeed essential to the nature of a free State, but this consists in lying no previous restraints upon publications’

But censorship of theatres continue and no theatre could be licensed or a play performed without the sanction of the Lord Chamberlain. By the Theatres Act 1843 the Lord Chamberlain was given statutory control over the theatres. He could forbid the production of a play for the preservation of good manners, decorum or the public peace. There was ordinarily no censorship of the press in England. When cinematograph came into being the Cinematograph Act, 1909 was passed to control cinemas. It has now been amended by the Cinematograph Act of 1952. Restrictions were placed on the exhibition of films to children (section 4) and on the admission of children to certain types of film. Today censorship of films is through the British Board of Film Censors which is an independent body not subject to control by the State. An elaborate inquiry is already on foot to consider whether State control is needed or not. Censorship of films is run on the lines set by T.P.O. Connor in 1918. These directions as we said earlier have had a great influence upon our laws and our directions issued by the Central Government follow closely the 43 points of T.P.O. Connor. It is wrong to imagine that there is no censorship in England. The Khosla Committee (P 32) has given examples of the cuts ordered and also a list of films which were found unsuitable. The Board has never worked to a Code although the directions

are followed. By 1950 three general principles were evolved. They are

1. Was the story, incident or dialogue likely to impair the moral standards of the public by extenuating vice or crime or depreciating moral standards?

2. Was it likely to give offence to reasonably minded cinema audiences?

3. What effect would it have on the minds of children?

40. We have digressed into the practice of the United States and the United Kingdom because analogies from these two countries were mainly relied upon by the petitioner and they serve as a very appropriate background from which to begin discussion on the question of censorship and the extent to which it may be carried

41. To begin with, our fundamental law allows freedom of speech and expression to be restricted as clause (2) itself shows. It was observed in *Ranjit D. Udesha v. State of Maharashtra*—

‘Speaking in terms of the Constitution it can hardly be claimed that obscenity which is offensive to modesty or decency is within the constitutional protection given to free speech or expression because the article dealing with the right itself excludes it. That cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions, or for the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the interest of public decency and morality. Section 292, Indian Penal Code manifestly embodies such a restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality.’

We adhere to this statement and indeed it is applicable to the other spheres where control is tolerated under our fundamental law. The argument that section 5B of the Cinematograph Act does not reproduce the full effect of the second clause

of Article 19 need not detain us. It appears that the draftsman used a copy of the Constitution as it was before the First Amendment and fell into the error of copying the obsolete clause. That, however, does not make any difference. The Constitution has to be read first and the section next. The latter can neither take away nor add to what the Constitution has said on the subject. The word 'reasonable' is not to be found in section 5-B but it cannot mean that the restrictions can be unreasonable. Not only the sense of the matter but the existence of the constitutional provision *in pari materia* must have due share and reading the provisions of the Constitution we can approach the problem without having to adopt a too liberal construction of section 5-B.

42. It, therefore, follows that the American and the British precedents cannot be decisive and certainly not the minority view expressed by some of the Judges of the Supreme Court of the former. The American Constitution stated the guarantee in absolute terms without any qualification. The Judges try to give full effect to the guarantee by every argument they can validly use. But the strongest proponent of the freedom (Justice Douglas) himself recognised in the *Kingsley* case¹ that there must be a vital difference in approach. This is what he said :

"If we had a provision in our Constitution for 'reasonable' regulation of the press such as India has included in hers, there would be room for argument that censorship in the interests of morality would be permissible".

In spite of the absence of such a provision Judges in America have tried to read the words 'reasonable restrictions' into the First Amendment and thus to make the rights it grants subject to reasonable regulations. The American cases in their majority opinions, therefore, clearly support a case of censorship.

43. It would appear from this that censorship of films, their classification according to age groups and their suitability for unrestricted exhibition with or without excisions is regarded as a valid exercise

of power in the interests of public morality decency etc. This is not to be construed as necessarily offending the freedom of speech and expression. This has, however, happened in the United States and therefore decisions, as Justice Douglas said in his Tagore Law Lectures (1939), have the flavour of due process rather than what was conceived as the purpose of the first Amendment. This is because social interest of the people override individual freedom. Whether we regard the state as the *parens patriae* or as guardian and promoter of general welfare, we have to concede, that false restraints on liberty may be justified by their absolute necessity and clear purpose. Social interests take in not only the interests of the community but also individual interests which cannot be ignored. A balance has therefore to be struck between the rival claims by reconciling them. The larger interests of the community require the formulation of policies and regulations to combat dishonesty, corruption, gambling, vice and other things of immoral tendency and things which affect the security of the State and the preservation of public order and tranquillity. As Ahrens said the question calls for a good philosophical canvas and strict logical methods.

44. With this preliminary discussion we say that censorship in India (and pre-censorship is not different in quality) has full justification in the field of the exhibition of cinema films. We need not generalize about other forms of speech and expression here for each such fundamental right has a different content and importance. The censorship imposed on the making and exhibition of films is in the interest of society. If the regulations venture into something which goes beyond this legitimate opening to restrictions, they can be questioned on the ground that a legitimate power is being abused. We hold, therefore, that censorship of films including prior restraint is justified under our Constitution.

45. This brings us to the next questions: How far can these restrictions go? and how are they to be imposed? This leads to an examination of the provisions contained in section 5-B (2). That provision authorises the Central Government to issue such directions as it may think fit setting out the principles which shall

1. (1959) 360 U.S. 684.

guide the authority competent to grant certificates under the Act in sanctioning films for public exhibition

46 The first question raised before us is that the Legislature has not indicated any guidance to the Central Government. We do not think that this is a fair reading of the section as a whole. The first subsection states the principles and read with the second clause of the nineteenth article it is quite clearly indicated that the topics of films or their content should not offend certain matters there set down. The Central Government in dealing with the problem of censorship will have to bear in mind those principles and they will be the philosophical compass and the logical methods of Ahrens. Of course, Parliament can adopt the directions and put them in schedule to the Act (and that may still be done) it cannot be said that there is any delegation of legislative function. If Parliament made a law giving power to close certain roads for certain vehicular traffic at stated times to be determined by the Executive authorities and they made regulations in the exercise of that power, it cannot for a moment be argued that this is insufficient to take away the right of locomotion. Of course, everything may be done by legislation but it is not necessary to do so if the policy underlying regulations is clearly indicated. The Central Government's regulations are there for consideration in the light of the guaranteed freedom and if they offend substantially against that freedom, they may be struck down. But as they stand they cannot be challenged on the ground that any recondite theory of law making, or a critical approach to the separation of powers is infringed. We are accordingly of the opinion that section 5 B (2) cannot be challenged on this ground.

47 This brings us to the manner of the exercise of control and restriction by the directions. Here the argument is that most of the regulations are vague and further that they leave no scope for the exercise of creative genius in the field of art. This poses the first question before us whether the 'void for vagueness' doctrine is applicable. Reliance in this connection is placed on *Municipal Committee Amritsar and another v The State of Punjab*¹. In that case a Division Bench

of this Court lays down that an Indian Act cannot be declared invalid on the ground it violates the due process clause or that it is vague. Shah, J., speaking for the Division Bench, observes

"the rule that an Act of a competent Legislature may be 'struck down' by the Courts on the ground of vagueness is alien to our constitutional system. The Legislature of the State of Punjab was competent to enact legislation in respect of 'fairs' vide Entry 28 of List II of the 7th Schedule to the Constitution. A law may be declared invalid by the superior Courts in India if the Legislature has no power to enact the law or that the law violates any of the fundamental rights guaranteed in Part III of the Constitution or is inconsistent with any constitutional provisions, but not on the ground that it is vague."

The learned Judge refers to the practice of the Supreme Court of the United States in *Claude C Connally v General Construction Co*², where it was observed

"A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law"

The learned Judge observes in relation to this as follows

"But the rule enunciated by the American Courts has no application under our constitutional set up. This rule is regarded as an essential of the 'due process clause' incorporated in the American Constitution by the 5th and 14th Amendments. The Courts in India have no authority to declare a statute invalid on the ground that it violates 'the due process of law'. Under our Constitution, the test of due process of law cannot be applied to the statutes enacted by the Parliament or the State Legislature."

Relying on the observations of Kania, C J in *A K Gopalan v The State of Madras*³,

1 (1926) 70 L.Ed. 322 269 U.S. 385

2 (1950) S.C.J. 174 (1950) 2 M.L.J. 42

(1950) S.C.R. 83

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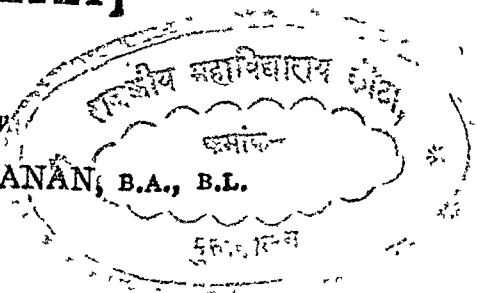
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Uttar Pradesh Industrial Disputes (Amendment and Miscellaneous Provisions) Act (I of 1957) section 17—Scope 307

[S.C. N.O. 31.]

C. A. Vaidialingam and
A. N. Ray, JJ.

Sukra Mahto v.

Basdeo Kumar Mahto.

2—4—1971.

Crl.A. No. 53 of 1968.

Penal Code (XLV of 1860), section 499,
Exception 9—Protection under—When
available.

The ingredients of the Ninth Exception to section 499 of the Penal Code are first that the imputation must be made in good faith ; secondly, the imputation must be for protection of the interest of the person making it or of any other person or for the public good. Good faith is a question of fact. So is protection of the interest of the person making it. Public good is also a question of fact.

The person alleging good faith has to establish as a fact that he made enquiry before he made the imputation and he has to give reasons and facts to indicate that he acted with due care and attention and was satisfied that the imputation was true. The proof of the truth of the statement is not an element of the Ninth Exception. The accent is on the enquiry, care and objective and not subjective satisfaction.

The protection of interest contemplated in the Ninth Exception to section 499 is that the communication must be made *bona fide* upon a subject in which the person making the communication has an interest or duty and the person to whom the communication is made has a corresponding interest or duty.

It would not be open to a person to deny or resist possession in a proceeding under section 144 of the Criminal Procedure Code, by hurling defamatory invective and then claim the benefit of protection of interest.

V.K.

Appeal dismissed.

[S.C. N.O. 32.]

S. M. Sikri, C.J.,
G. K. Mitter,
K. S. Hegde,
A. N. Grover and
P. Jaganmohan Reddy, JJ.Indian Mica and Micanite
Industries Ltd. v.
State of Bihar.

2—4—1971.

C A. No. 770 of 1967.

(A) Bihar and Orissa Excise Act (II of 1915), section 90—Rule 111 of Rules framed under—Levy under rule 111—Validity—If can be upheld as a fee.

Before any levy can be upheld as a fee, it must be shown that the levy has reasonable co-relationship with the services rendered by the Government. In other words, the levy must be proved to be a *quid pro quo* for the services rendered. But in these matters it will be impossible to have an exact correlationship. The correlationship expected is one of a general character and not as of arithmetical exactitude.

The correlationship between the services rendered and the fee levied is essentially a question of fact.

Generally speaking by granting a licence the State does not confer any privilege or benefit on any one. All that it does is to regulate a trade, business or profession in public interest.

In the instant case *prima facie* the levy under rule 111 of the rules framed under section 90 of the Bihar and Orissa Excise Act, 1915, appears to be excessive even if the State can be said to be rendering some service to the licensees. The State ought to be in possession of the material from which the correlationship between the levy and the services rendered can be established at least in a general way. But the State has not chosen to place those materials before the Court. Therefore the levy under the impugned rule cannot be justified.

(B) Constitution of India (1950), Article 132—State failing to place necessary material before High Court to justify the impugned levy under rule 111 of the Rules framed under Bihar and Orissa Excise Act, 1915—State praying for opportunity to

place such material in appeal before Supreme Court—Held, State might suffer considerable loss if rule 111 was held void—Hence case remanded to High Court with opportunity to State to place the necessary material, to justify the levy as a special case

V K *Appeal allowed*

[SC NC 33]

S M Sikri, C.J.

G K Mitter,

K S Hegde,

A N Grover and

P Jaganmohan Reddy, JJ

Manhar Lal Bhogilal Shah v

State of Maharashtra

5-4-1971 Crl A No 44 (N) of 1967

Sea Customs Act (VIII of 1878), section 187-A—Validity—If violative of Article 14 of the Constitution of India

The argument that section 187-A of the Sea Customs Act is unconstitutional on the ground that it is violative of Article 14 of the Constitution is untenable. The power conferred by section 187 A has to be exercised for effectuating the object and purpose of the Act keeping in view the entire scheme. It cannot therefore be said that any unguided discretion or power has been conferred which would come within the inhibition of Article 14 of the Constitution

V K. *Appeal allowed in part*

[SC NC 34]

C A Vaidialingam and

A N Ray, JJ

Nasuriddin v

State of Assam

7-4-1971 Crl A No 285 of 1968

Penal Code (XLV of 1860), section 457—Offence under—Ingredients—House breaking by night for abducting a woman by several persons—Common object of abduction, however, not proved—Conviction of all accused under section 457—Legality

In order to support the conviction under section 457 it is necessary to prove first that there was lurking house trespass by night or house breaking by night. - The

second ingredient is that the house trespass or house breaking was in order to commit an offence punishable with imprisonment. In the present case though the Courts below found that there was no common object of abducting they found that the appellants committed house breaking by night for the purpose of committing the offence of abducting her. Thus the house breaking by night was for the purpose of committing an offence punishable with imprisonment. The ingredients of section 457 of the Penal Code have been proved

V K *Appeal dismissed*

[SC NC 35]

C A Vaidialingam and

A N Ray JJ

Devil Lal v

State of Rajasthan

8-4-1971 Crl A No 28 of 1969

(A) Criminal Trial—New prosecution case—Cannot be made to imperil defence

In criminal trials it is of prime importance for the accused to know as to what the exact prosecution case is. If the pivot of the prosecution case is not accepted a new prosecution case cannot be made to imperil defence

(B) Penal Code (XLV of 1860), sections 34 and 149—Distinction between

Under section 34 of the Penal Code when a criminal act is done by several persons in furtherance of the common intention of all each of such persons is liable for that act in the same manner as if it were done by him alone. The words "in furtherance of the common intention of all" are a most essential part of section 34 of the Penal Code. It is common intention to commit the crime actually committed. This common intention is anterior in time to the commission of the crime. Common intention means a pre-arranged plan. On the other hand, section 149 of the Penal Code speaks of an offence being committed by any member of an unlawful assembly in prosecution of the common object of that assembly. The distinction between "common intention" under section 34 and "common object" under section 149 is of vital importance. The

Sessions Court fell into the error of convicting the appellants under section 302 read with section 34 of the Penal Code holding that "if a number of persons assault another with a stick mercilessly their intention can only be to murder that man or at least they should know that they are likely to cause death of the persons concerned". This aspect of their being likely to cause death would be relevant under section 149 and not under section 34 for the obvious reason that under section 34 it has to be established that there was the common intention before the participation by the accused.

V.K.

Appeal allowed.

[S.C. N.C. 36.]

*C. A. Vaidialingam and
A. N. Ray, JJ.*

**George Dominic Varkey v.
State of Kerala.**

8—4—1971. CrI. A. No. 276 of 1968.

**Penal Code (XLV of 1860), section 99,
Clause 4—Right of private defence to the
body—Whether had been exceeded—Deter-
mination—Criterion.**

Broadly stated the right of private defence rests on three ideas: first there must be no more harm inflicted than is necessary for the purpose of defence; secondly, there must be reasonable apprehension of danger to the body from the attempt or threat to commit some offence and thirdly, the right does not commence until there is a reasonable apprehension. It is entirely a question of fact in the circumstances of a case as to whether there has been excess of private defence within the meaning of the fourth clause of section 99 of the Penal Code, namely, that more harm is inflicted than necessary for the purpose of defence. No one can be expected to find any pattern of conduct to meet a particular case. The apprehension is in the mind of the person exercising the right of self-defence and apprehension is to be ascertained objectively with reference to events and deeds at that crucial time and in the total situation of surrounding circumstances.

V.K.

Appeal allowed.

[S.C. N.C. 37.]

*J. M. Shelat,
I. D. Dua and
V. Bhargava, JJ.*

**N. Vasundara v.
State of Mysore.**

15—4—1971.

W.P. No. 606 of 1970.

Education—Rules for selection of candidates for admission to the pre-professional/B.Sc.-In the Government Medical Colleges framed by the State of Mysore on 4th July, 1970—Rule 3—Constitutional validity—If violative of Article 14 of the Constitution of India.

Rule 3 of the rules for selection of candidates for admission to the Pre-Professional/B Sc in the Government Medical Colleges in the State of Mysore framed by that State on 4th July, 1970, which requires residence in the State of Mysore for a period of ten years prior to the date of application for eligibility to apply for a seat, does not violate Article 14 of the Constitution. The object of framing the impugned rule seems to be to attempt to impart medical education to the best talent available out of the class of persons who are likely, so far as it can reasonably be foreseen, to serve as doctors, the inhabitants of the State of Mysore. It is true that it is not possible to say with absolute certainty that all those admitted to the medical colleges would necessarily stay in Mysore State after qualifying as doctors. They have indeed a fundamental right as citizen to settle anywhere in India and they are also free, if they so desire and can manage to go out of India for further studies or even otherwise. But these possibilities are permissible and inherent in our constitutional set up and these considerations cannot adversely affect the constitutionality of the otherwise valid rule.

The State has to formulate with reasonable foresight a just scheme of classification for imparting medical education to the available candidates which would serve the object and purpose of providing broad based medical aid to the people of the State and to provide medical education to those who are best suited for such education. Proper classification inspired by this consideration and selection on merit from such classified groups

therefore cannot be challenged on the ground of inequality violating Article 14 of the Constitution of India

There is no doubt a likelihood of some cases of hardship under the impugned rule. But cases of hardship are likely to arise in the working of almost any rule which may be framed for selecting a limited number of candidates for admission out of a long list. This however, would not render the rule unconstitutional. For relief against hardship in the working of a valid rule the petitioner has to approach elsewhere because it relates to the policy underlying the rule.

V K. ——— *Petition dismissed*

[S C N O 38]

G K Mitter

S M Sikri C.J.,

K S Hegde

A N Grover and

P Jagannathan Reddy JJ

M Gurumoorthy v
Accountant General, Assam and
Nagaland

21-4-1971 C.A No 2023 of 1968

Constitution of India (1950), Article 229
—Object and scope—Appointment of
officers by High Court—Cannot be inter-
fered with by the executive

The unequivocal purpose and obvious intention of the framers of the Constitution in enacting Article 229 of the Constitution is that, in the matter of appointments of officers and servants of a High Court it is the Chief Justice or his nominee who is to be the supreme authority and there can be no interference by the executive except to the limited extent that is provided in the article. This is essentially to secure and maintain the independence of the High Courts. The anxiety of the Constitution makers to achieve that object is fully shown by putting the administrative expenses of a High Court including all salaries allowances and pension payable to or in respect of officers and servants of the Court at the same level as the salaries and allowances of the judges of the High Court nor can the amount of any expenditure so charged be varied even by the Legislature. Clause (1) read with clause (2) of Article 229

confers exclusive power not only in the matter of appointments but also with regard to prescribing the conditions of service of officers and servants of a High Court by rules on the Chief Justice of the Court. This is subject to any legislation by the State Legislature but only in respect of conditions of service. In the matter of appointments even the Legislature could not abridge or modify the powers conferred on the Chief Justice under clause (1) of Article 229.

In the instant case it is difficult to understand how the Government could interfere in the choice of the person appointed by the Chief Justice as his secretary or insist on his having certain type of qualifications. If there were any technical difficulties they could be easily sorted out by mutual co-operation which is essential between the Chief Justice of the High Court and the State Government in such matters. But instead of doing so the unusual step of the Accountant General with holding the pay slips under the directions of the Government was taken for which there was no legal justification or warrant.

V K. ——— *Appeal allowed*

to the effect that a law cannot be declared void because it is opposed to the spirit supposed to pervade the Constitution but not expressed in words, the conclusion above set out is reiterated. The learned Judge, however, adds that the words "cattle fair" in Act there considered are sufficiently clear and there is no vagueness.

48. These observations which are clearly *obiter* are apt to be too generally applied and need to be explained. While it is true that the principles evolved by the Supreme Court of the United States of America in the application of the Fourteenth Amendment were eschewed in our Constitution and instead the limits of restrictions on each fundamental right were indicated in the clauses that follow the first clause of the nineteenth article, it cannot be said as an absolute principle that no law will be considered bad for sheer vagueness. There is ample authority for the proposition that a law affecting fundamental rights may be so considered. A very pertinent example is to be found in *State of Madhya Pradesh and another v. Baldeo Prasad*¹, where the Central Provinces and Berar Goondas Act, 1946, was declared void for uncertainty. The condition for the application of sections 4 and 4-A was that the person sought to be proceeded against must be a *goonda* but the definition of *goonda* in the Act indicated no tests for deciding which person fell within the definition. The provisions were therefore held to be uncertain and vague.

49. The real rule is that if a law is vague or appears to be so, the Court must try to construe it, as far as may be and language permitting, the construction sought to be placed on it, must be in accordance with the intention of the Legislature. Thus if the law is open to diverse construction that construction which accords best with the intention of the Legislature and advances the purpose of legislation, is to be preferred. Where however the law admits of no such construction and the persons applying it are in a boundless sea of uncertainty and the law *prima facie* takes away a guaranteed freedom, the law must be held to offend the Constitution as was done in the case of the

Goonda Act. This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual. If possible, the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases.

50. Judging the directions from this angle, we find that there are general principles regarding the films as a whole and specific instances of what may be considered as offending the public interests as disclosed in the clause that follows the enunciation of the freedoms in Article 19 (1) (a). The general principles which are stated in the directions seek to do more than restate the permissible restrictions as stated in clause (2) of Article 19 and section 5-B (1) of the Act. They cannot be said to be vague at all. Similarly, the principles in section IV of the directions in relation to children and young persons are quite specific and also salutary and no exception can be taken. It is only the instances which are given in section I, clauses A to D which need to be considered. Read individually they give ample direction as to what may not be included. It is argued on the basis of some American cases already noticed by us that these expressions are vague. We do not agree. The words used are within the common understanding of the average man. For example the word 'rape' indicates what the word is, ordinarily, understood to mean. It is hardly to be expected or necessary that the definition of rape in the Penal Code must be set down to further expose the meaning. The same may be said about almost all the terms used in the directions and discussed before us. We do not propose to deal with each topic for that is really a profitless venture. Fundamental rights are to be judged in a broad way. It is not a question of semantics but of the substance of the matter. It is significant that Justice Douglas who is in favour of a very liberal and absolute application of the First Amendment in America is of the view that 'sexual promiscuity' was not vague, while those, in favour of prior restraints thought that it was. We have referred earlier to the case. We are quite clear that expressions like 'seduction'

1. (1961) M.L.J. (Crl.) 603; (1961) 2 S.C.J. 484; (1961) 1 S.C.R. 970 at 979.

'immoral traffic in women,' 'soliciting, prostitution or procuration', 'indecent sexual situation and 'scenes suggestive of immorality', 'traffic and use of drugs, 'class hatred, blackmail associated with immorality are within the understanding of the average man and more so of persons who are likely to be the panel for purpose of censorship. Any more definiteness is not only not expected but is not possible. Indeed if we were required to draw up a list we would also follow the same general pattern

[51] But what appears to us to be the real flaw in the scheme of the directions is a total absence of any direction which could tend to preserve art and promote it. The artistic appeal or presentation of an episode robs it of its vulgarity and harm and this appears to be completely forgotten. Artistic as well as inartistic presentations are treated alike and also what may be socially good and useful and what may not. In *Ranjit D Uden's case*¹ this Court laid down certain principles on which the obscenity of a book was to be considered with a view to deciding whether the book should be allowed to circulate or withdrawn. Those principles apply *mutatis mutandis* to films and also other areas besides obscenity. The Khosla Committee also adopted them and recommended them for the guidance of the film censors. We may reproduce them there as summarized by the Khosla Committee

"The Supreme Court laid down the following principles which must be carefully studied and applied by our censors when they have to deal with a film said to be objectionable on the ground of indecency or immorality—

- (1) Treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more
- (2) Comparison of one book with another to find the extent of permissible action is not necessary
- (3) The delicate task of deciding what is artistic and what is obscene has to

be performed by Courts and in the last resort, by the Supreme Court and so, oral evidence of men of literature or others on the question of obscenity is not relevant

(4) An overall view of the obscene matter in the setting of the whole work would of course be necessary but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity is so decided that it is likely to deprave or corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall

(5) The interests of contemporary society, and particularly the influence of the book etc., on it must not be overlooked

(6) Where obscenity and art are mixed, art must be so preponderating as to throw obscenity into shadow or render the obscenity so trivial and insignificant that it can have no effect and can be overlooked

(7) Threatening with sex in a manner offensive to public decency or morality which are the words of our Fundamental Law judged by our national standards and considered likely to pander to lascivious, prurient or sexually precocious minds must determine the result

(8) When there is propagation of ideas, opinions and informations or public interests or profits, the interests of society may tilt the scales in favour of free speech and expression. Thus books on medical science with intimate illustrations and photographs though in a sense immodest, are not to be considered obscene but the same illustrations and photographs collected in a book form without the medical text would certainly be considered to be obscene

(9) Obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech or expression. Obscenity is treating with sex in a manner appealing to the carnal side of human nature or having that tendency. Such a treat-

ing with sex is offensive to modesty, decency.

(10) Knowledge is not a part of the guilty act. The offender's knowledge of the obscenity of the book is not required under the law and it is a case of strict liability."

Application of these principles does not seek to whittle down the fundamental right of free speech and expression beyond the limits permissible under our Constitution for however high or cherished that right it does not go to pervert or harm society and the line has to be drawn somewhere. As was observed in the same case:

".....The test which we evolve must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not....."

A similar line has to be drawn in the case of every topic in films considered unsuitable for public exhibition or specially to children.

52. We may now illustrate our meaning how even the items mentioned in the directions may figure in films subject either to their artistic merit or their social value outweighing their offending character. The task of the censor is extremely delicate and his duties cannot be the subject of an exhaustive set of commands established by prior rationation. But direction is necessary to him so that he does not sweep within the terms of the directions vast areas of thought, speech and expression of artistic quality and social purpose and interest. Our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. The standards that we set for our censors must make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret life and society with some of its foibles along with what is good. We must not look upon such human relationships as banned *in toto*

and for ever from human thought and must give scope for talent to put them before society. The requirements of art and literature include within themselves a comprehensive view of social life and not only in its, or deal form and the line is to be drawn where the average man, moral man, begins to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genius or social value. If the depraved begins to see in these things more than what an average person would, in much the same way, as it is wrongly said, a Frenchman sees a woman's legs in everything it cannot be helped. In our scheme of things ideas having redeeming social or artistic value must also have importance and protection for their growth. Sex and obscenity are not always synonymous and it is wrong to classify sex as essentially obscene, or even indecent or immoral. It should be our concern, however, to prevent the use of sex designed to play a commercial role by making its own appeal. This draws in the censors' scissors. Thus audiences in India can be expected to view with equanimity the story of Oedipus son of Latrus who committed patricide and incest with his mother. When the seer Tiresias exposed him, his sister Jocasta committed suicide by hanging herself and Oedipus put out his own eyes. No one after viewing these episodes would think that patricide or incest with one's own mother is permissible or suicide in such circumstances or tearing out one's own eyes is a natural consequence. And yet if one goes by the letter of the directions the film cannot be shown. Similarly, scenes depicting leprosy as a theme in a story or in a documentary are not necessarily outside the protection. If that were so Verrier Elwyn's *Phulmat of the Hills* or the same episode in Henryson's *Testament of Cresseid* (from where Verrier Elwyn borrowed the idea) would never see the light of the day. Again carnage and bloodshed may have historical value and the depiction of such scenes as the sack of Delhi by Nadir Shah may be permissible, if handled delicately and as part of an artistic portrayal of the confrontation with Mohammad Shah Rangila. If Nadir Shah made golgothas of skulls, must we leave them out of the story because people must be made to

view a historical theme without true history? Rape in all its nakedness may be objectionable but Voltaire's *Candide* would be meaningless without Cunegonde's episode with the soldier and the story of Lucrece could never be depicted on the screen

53 Therefore it is not the elements of rape leprosy sexual immorality which should attract the censors scissors but how the theme is handled by the producer. It must, however, be remembered that the cinematograph is a powerful medium and its appeal is different. The horrors of war as depicted in the famous etchings of Goya do not horrify one so much as the same scenes rendered in colour and with sound and movement would do. We may view a documentary on the erotic tableaux from our ancient temples with equanimity or read the *Kamasutra* but a documentary from them as a practical sexual guide would be abhorrent

54 We have said all this to show that the items mentioned in the directions are not by themselves defective. We have adhered to the 43 points of T P O Connor framed in 1918 and have made a comprehensive list of what may not be shown. Parliament has left this task to the Central Government and in our opinion, this could be done. But Parliament has not legislated enough, nor has the Central Government filled in the gap. Neither has separated the artistic and the sociably valuable from that which is deliberately indecent, obscene, horrifying or corrupting. They have not indicated the need of society and the freedom of the individual. They have thought more of the depraved and less of the ordinary moral man. In their desire to keep films from the abnormal, they have excluded the moral. They have attempted to bring down the public motion picture to the level of home movies

55 It was for this purpose that this Court was at pains to point out in *Ranjit D Udeshi's case*¹, certain considerations for the guidance of censorship of books. We think that those guides work as well here. Although we are not inclined to hold that the directions are defective in so far as they go, we are of opinion that

directions to emphasize the importance of art to a value judgment by the censors need to be included. Whether this is done by Parliament or by the Central Government it hardly matters. The whole of the law and the regulations under it will have always to be considered and if the further tests laid down here are followed the system of censorship with the procedural safeguards accepted by the Solicitor General will make censorship accord with our fundamental law

56 We allow this petition as its purpose is more than served by the assurance of the Solicitor General and what we have said but in the circumstances we make no order about costs

V K ————— *Petition allowed*

THE SUPREME COURT OF INDIA (Civil Appellate Jurisdiction)

PRESENT —J C Shah and V Bhargava, JJ

Shri Manni Lal *Appellant**

v

Shri Parmal Lal and others *Respondents*

Representation of the People Act (XLIII of 1951), sections 8 (2) and 100 (1) (a)—Conviction for criminal offence of returned candidate before polling and declaration of result—Conviction set aside in appeal during pendency of election petition—Election, if liable to be set aside on the ground that the returned candidate was disqualified under section 8 (2)

The provision in section 8 (2) of the Representation of the People Act, 1951, read with Article 102 (1) (e) of the Constitution is that a person convicted by a Court in India for any offence and sentenced to imprisonment for not less than two years shall be disqualified from the date of such conviction for being chosen as a member of the Legislative Assembly and shall continue to be disqualified for a further period of five years since his release. It is, however, significant that the High Court under section 100 (1) (a)

of the Act is to declare the election of a returned candidate to be void if it is of opinion that on the date of his election, a returned candidate was not qualified, or was disqualified to be chosen to fill the seat. It is true that the opinion has to be formed as to whether the successful candidate was disqualified on the date of his election; but this opinion is to be formed at the time of pronouncing the judgment in the election petition.

[*Paras. 3, 4.*]

Thus, where a returned candidate was convicted for an offence before polling took place and the result was declared but during the pendency of an election petition challenging his election his conviction was set aside in appeal, the election could not be set aside on the ground that the returned candidate was disqualified under section 8 (2). For, in a criminal case acquittal in appeal does not take effect merely from the date of the appellate order setting aside the conviction; it has the effect of retrospectively wiping out the conviction and the sentence awarded by the lower Court. [*Paras. 3, 4.*]

Appeal under section 116-A of the Representation of the People Act, 1951 from the Judgment and Order dated the 27th October, 1969, of the Allahabad High Court in Election Petition No. 1 of 1969.

G.N. Dikshit, Advocate, for Appellant.

K.C. Sharma, M.S. Gupta and S.K. Dhingra, Advocates, for Respondent No. 1.

The Judgment of the Court was delivered by

Bhargava, J.—This is an appeal by Manni Lal who was one of the candidates for election to the U.P. Legislative Assembly from Ahirori (Scheduled Caste) Constituency of Hardoi District, and who was defeated at that election by respondent No. 1 Parmai Lal. The election was challenged on two principal grounds. One ground was that respondent No. 1 was disqualified under section 8 (2) of the Representation of the People Act, 1951 (hereinafter referred to as "the Act") for being chosen as a member of the Legislative Assembly, because he was convicted for offences under sections 148 and 304 of the Indian Penal Code on 11th January, 1969, and was sentenced to imprisonment exceeding two years. The other ground was that a number of ballot papers cast in favour of the appellant had been

wrongly rejected instead of being counted in favour of the appellant, that some ballot papers were wrongly counted for respondent No. 1 instead of being rejected, and that some ballot papers were wrongly counted in favour of respondent No. 1 instead of being counted in favour of the appellant or other candidates. The High Court of Allahabad framed three different issues in respect of this claim of wrong rejection or wrong counting of the ballot papers. In the written statement, respondent No. 1 pleaded that a number of ballot papers were wrongly counted in favour of the appellant instead of being counted in favour of the other candidates, that a number of ballot papers were wrongly rejected instead of being counted in favour of respondent No. 1, and, further, that a number of ballot papers were wrongly counted in favour of the appellant instead of being rejected. The learned Judge, who tried the election petition, framed three issues in respect of these pleadings also which were put forward in the written statement and not by way of a petition of recrimination. On the basis of examination of the ballot papers and the evidence before him, a finding was recorded that, after correcting the errors made in counting, the net result would be that the appellant will have a net gain of only 6 votes, while respondent No. 1 would have a net loss of 24 votes. It appears that respondent No. 1 had received 13,508 votes, while the appellant had received 13,271 votes. After taking into account the finding, the valid votes received by the appellant would total to 13,277, while respondent No. 1 would still have 13,484 valid votes, so that the election of respondent No. 1 could not be declared void. The appellant had claimed that, on a proper counting, it would be found that he had a majority of votes, and had prayed for a declaration that he is the successful candidate. On the finding recorded, both the prayers of the appellant failed. The High Court further held that respondent No. 1 was not disqualified under section 8 (2) of the Act and, consequently, his election was valid. The petition having been dismissed by the High Court, the appellant has now come up in this appeal under section 116-A of the Act.

2. On the issue relating to disqualification, the facts that need be noticed

are that 9th January, 1969 was the last date for filing nominations in this constituency and respondent No 1 was convicted two days later on 11th January, 1969 and sentenced, *inter alia*, to ten years rigorous imprisonment under section 304, Indian Penal Code. On 16th January, 1969 he filed an appeal against this conviction in the High Court. Polling took place on 9th February, 1969 and the result was declared on 11th February, 1969. Respondent No 1 was declared as the successful candidate having secured the largest majority of votes. On 30th September, 1969, his appeal was allowed by the High Court and his conviction and sentence were set aside. At this time, the election petition was still pending. In fact, the judgment in the election petition was delivered on 27th October, 1969.

3 On these facts it is clear that, though the conviction of respondent No 1 was recorded by the trial Court on 11th January, 1969 he was acquitted on 30th September, 1969 in appeal which acquittal had the effect of completely wiping out the conviction. The appeal having once been allowed it has to be held that the conviction and sentence were vacated with effect from the date on which the conviction was recorded and the sentence awarded. In a criminal case, acquittal in appeal does not take effect merely from the date of the appellate order setting aside the conviction, it has the effect of retrospectively wiping out the conviction and the sentence by the lower Court. The disqualification relied upon by the appellant was laid down under section 8 (2) of the Act read with Article 102 (1) (e) of the Constitution. The provision is that a person convicted by a Court in India for any offence and sentenced to imprisonment for not less than two years shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of five years since his release. The argument on behalf of the appellant was that, though respondent No 1 was not disqualified on 9th February, 1969, the date of polling as well as on 11th February 1969 when the result was declared because his conviction had been recorded and he had been sentenced to ten years rigorous imprisonment on 11th January,

1969. It was further urged that, though the appeal has been filed, that appeal did not have the effect of wiping out this conviction. In these circumstances, it was urged that his election was void and should have been set aside on the ground of this disqualification.

4 This argument overlooks the fact that an appellate order of acquittal takes effect retrospectively and the conviction and sentence are deemed to be set aside with effect from the date they were recorded. Once an order of acquittal has been made, it has to be held that the conviction has been wiped out and did not exist at all. The disqualification, which existed on the 9th or 11th February, 1969 as a fact, was wiped out when the conviction recorded on 11th January, 1969 was set aside and that acquittal took effect from that very date. It is significant that the High Court, under section 100 (1) (a) of the Act is to declare the election of a returned candidate to be void if the High Court is of opinion that, on the date of his election, a returned candidate was not qualified, or was disqualified to be chosen to fill the seat under the Constitution or the Act. It is true that the opinion has to be formed as to whether the successful candidate was disqualified on the date of his election; but this opinion is to be formed by the High Court at the time of pronouncing the judgment in the election petition. In this case, the High Court proceeded to pronounce the judgment on 27th October 1969. The High Court had before it the order of acquittal which had taken effect retrospectively from 11th January, 1969. It was, therefore, impossible for the High Court to arrive at the opinion that on 9th or 11th February 1969, respondent No 1 was disqualified. The conviction and sentence had been retrospectively wiped out, so that the opinion required to be formed by the High Court to declare the election void could not be formed. The situation is similar to one that could have come into existence if Parliament itself had chosen to repeal section 8 (2) of the Act retrospectively with effect from 11th January, 1969. Learned Counsel conceded that, if a law had been passed repealing section 8 (2) of the Act and the law had been deemed to come into effect from 11th January 1969 he could not have possibly

urged thereafter, when the point came up before the High Court, that respondent No. 1 was disqualified on 9th or 11th February, 1969. The setting aside of the conviction and sentence in appeal has a similar effect of wiping out retrospectively the disqualification. The High Court was, therefore, right in holding that respondent No. 1 was not disqualified and that his election was not void on that ground.

5. On the second point, the main argument of counsel for the appellant was that the High Court committed the error of framing three issues on the basis of pleadings in the written statement which challenged the correctness of the acceptance or rejection of ballot papers without any recrimination being filed by respondent No. 1 under section 97 of the Act. Counsel wanted to argue this question of law in detail, but we consider that, in the present case, it is not necessary to go into this point at all. Even if the three issues framed on the basis of pleadings in the written statement are ignored, and account is taken only of findings recorded on the three issues framed on the basis of pleadings in the election petition, it would be found that respondent No. 1 still had a majority of valid votes, and the appellant could not claim that the election of respondent No. 1 be set aside and the appellant be declared as the successful candidate. The findings of fact recorded by the Judge are that, under Issue No. 5 18 ballot papers mentioned in Schedules III and IV should be counted as valid votes for the appellant, while 24 ballot papers were wrongly counted in favour of respondent No. 1. Under Issue No. 3, the finding is that the appellant is entitled to add 111 valid votes in his favour and, under Issue No. 4, the finding is that 74 votes would be lost by respondent No. 1. If these figures are accepted and taken into account, the appellant would receive 13,400 valid votes, being the total of 13,271 votes found in his favour at the time of declaration of the result and 129 votes which the appellant is entitled to add as a result of the findings on the three issues. So far as respondent No. 1 is concerned, he loses 98 votes as a result of the findings recorded by the High Court; and, on deducting these votes from 13,508 received by him respondent

No. 1 is left with 13,410 votes. Respondent No. 1 thus, has a majority of 10 votes, so that his election, is valid.

6. Counsel, however, challenged one finding recorded by the High Court in respect of 64 ballot papers which, the appellant had claimed, had been wrongly rejected and should have been counted in his favour. These ballot papers have not been produced before us. The learned Judge held that they were invalid votes because "they bear no recognisable seal impression that might be said to have been made with the instrument supplied for marking the vote". The argument of Counsel for the appellant is that, even on this finding recorded by the High Court, these votes should have been counted in his favour, because they cannot be held liable to rejection under rule 56 (2) (b) of the Conduct of Elections Rules, 1961. That sub-rule runs as follows:

"The returning officer shall reject a ballot paper if, to indicate the vote, it bears no mark at all or bears a mark made otherwise than with the instrument supplied for purpose."

The argument urged is that, according to the Judge, the impressions on these 64 ballot papers could not be identified with the seal supplied for marking the votes, which only leads to the inference that they may bear marks with that seal or may not. For rejection under rule 56 (2) (b), there must be a definite finding that they bore marks made otherwise than with the seal supplied for the purpose. In this case, the Returning Officer rejected the ballot papers holding that the marks made on these ballot papers were made otherwise than with the instrument supplied for the purpose. The appellant challenged that decision of the Returning Officer in this election petition. The burden lay on him to establish that the Returning Officer had wrongly rejected these ballot papers. He could only succeed if he had proved that the marks made were with the instrument supplied for the purpose. This the appellant failed to do. In fact, the finding recorded by the learned Judge of the High Court amounts to holding that the marks made cannot be identified with the seal which was supplied for marking the votes and, consequently, an inference follows

that they must have been made by some other means. On this finding, the learned Judge was quite correct in not upsetting the order of the Returning Officer rejecting these votes. If these 65 votes are not counted in favour of the appellant, the appellant's case fails, for the majority of votes still remains in favour of respondent No 1.

7 The appeal, therefore, fails and is dismissed with costs.

V K ————— *Appeal dismissed*

THE SUPREME COURT OF INDIA

(Criminal Appellate Jurisdiction)

PRESENT — *V Bhargava and I D Dua, JJ*

Ram Jas ————— *Appellant**

v

State of UP ————— *Respondent*

Penal Code (XLV of 1860), sections 415, 419 and 109—Offence of cheating—Ingredients—Oath Commissioner induced to attest and an affidavit by deception practised by appellant in wrongly identifying the person swearing to it—Conviction of appellant under section 419 read with section 109—Legality *on*

The ingredients required to constitute the offence of cheating are (1) There should be fraudulent or dishonest inducement of a person by deceiving him, (2) (a) The person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property or (b) The person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived and (3) In cases covered by (2) (b), the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property.

[Para 3]

In the present case the finding of fact recorded only shows that the Oath Commissioner was induced to attest the affidavit by the deception practised by the

appellant in wrongly identifying person as G when he was in fact not G. That act done by the Oath Commissioner of attesting the affidavit could not, however, possibly cause any damage or harm to the Oath Commissioner in body, mind, reputation or property. The Oath Commissioner was obviously not induced to deliver any property to anybody by his wrong identification, nor was he induced to consent that any person should retain any property. Thus, the facts found did not constitute the offence of cheating at all. The conviction for an offence under section 419, substantively or with the aid of section 109, Indian Penal Code, could only have been justified if the facts proved constituted all the ingredients of the offence of cheating. Clearly, therefore, the High Court fell into an error in recording the conviction of the appellant for the offence under section 419 read with section 109, Indian Penal Code. [Para 3]

Appeal by Special Leave from the Judgment and Order dated the 14th December 1966 of the Allahabad High Court in Criminal Appeal No 1971 of 1964.

S C Agarwal, R K Garg and D P Singh, Advocates of M/s Ramamurthi & Co and Miss S Chakravarti, V J Francis and N Neller, Advocates, for Appellant

O P Rana, Advocate, for Respondent

The Judgment of the Court was delivered by

Bhargava J—The appellant Ram Jas, was tried along with four others, Madan Lal, Inder Singh, Badri Nath, and Ram Nath, on charges under section 120-B of the Indian Penal Code and sections 420/511, 467, 468 and 471 read with section 120-B of the Indian Penal Code. He was convicted for offences under these sections and was awarded a cumulative sentence of three years' rigorous imprisonment and a fine of Rs 3,000 in default, two years' rigorous imprisonment. He went in appeal before the High Court of Allahabad. The High Court came to the view that the appellant had at least committed an offence punishable under section 419 read with section 109 Indian Penal Code, even if the other charges, for which he had been convicted may not be established. On this view, and relying on the power

* Cr A. No 113 of 1967

of the Court to convert his conviction to appropriate sections of the Indian Penal Code, the High Court substituted the conviction of the appellant under section 419 read with section 109, Indian Penal Code, for the conviction recorded by the trial Court, and reduced his sentence to two years' rigorous imprisonment, while maintaining the fine of Rs. 3,000. The appellant has now come up in appeal to this Court against this judgment of the High Court by Special Leave.

2. Before dealing with the correctness of the conviction recorded by the High Court, we may take notice of the fact that the High Court, in its judgment, did not examine the evidence relating to the offences for which the appellant had been convicted by the trial Court and has not recorded any findings on the facts which, according to the prosecution, constituted the commission of those offences. It is not necessary to reproduce the ingredients of all the offences with which the appellant was charged. It is sufficient to mention three charges which are relevant to the question whether the conviction recorded by the High Court is justified. One of the charges was under section 468 read with section 120-B, Indian Penal Code, in respect of forgery of three affidavits of Govind Ram, two dated 7th February, 1959, and one dated 16th February, 1959, committed with the intention of using the affidavits for the purpose of cheating. The second charge under section 320 read with section 120-B, Indian Penal Code, related to cheating two persons, Madan Lal and Chunni Lal, by dishonestly inducing them to deliver certain sums of money so as to get their debts adjusted against the claim of Govind Ram who was a refugee from Pakistan; and the third charge under section 420/115 read with section 120-B, Indian Penal Code, was of attempting to cheat the officer of the District Relief and Rehabilitation - *cum* - Settlement Officer, Saharanpur, by dishonestly inducing the officer to adjust the debts of Madan Lal and Chunni Lal against the claim of using the forged affidavits in that connection. The trial Court convicted the appellant for all these charges, and the appeal in the High Court was against that conviction. The High Court, on appeal, however, convicted the appellant for the offence punishable under section

419 read with section 109, Indian Penal Code, on the finding that the appellant had at least abetted the execution of one false affidavit of Govind Ram which, in fact, was signed by some person other than Govind Ram and that person was wrongly identified by the appellant before the Oath Commissioner and, as such, the appellant was held guilty of abetting the offence of cheating by personation constituting the offence punishable under section 419 read with section 109, Indian Penal Code.

3. In recording this finding and conviction, the High Court lost sight of the fact that no such charge was framed against the appellant in the trial Court. As we have indicated above, the persons, who were cheated or attempted to be cheated, referred to in the charges framed against the appellant, were Madan Lal, Chunni Lal, or the officer of the Relief and Rehabilitation-*cum*-Settlement Officer, Saharanpur. There was no charge at all relating to any cheating or attempting to cheat the Oath Commissioner. In fact, the case was never brought to Court with the intention of obtaining conviction of the appellant for any offence of cheating in respect of the Oath Commissioner. Not only was there no charge in this respect but, in addition, the appellant when questioned under section 342 of the Code of Criminal Procedure after the prosecution evidence had been recorded, was not asked to explain evidence relating to such a charge of cheating the Oath Commissioner. No doubt, there was mention of commission of forgery of affidavits; but the mention of the commission of that offence could not possibly lead the appellant to infer that he was liable to be convicted for abetting the offence of cheating the Oath Commissioner. Further, in recording this conviction, the High Court did not even care to examine in detail whether all the ingredients of the offence had been established by the prosecution evidence. The only finding of fact was that the appellant, who was known to the Oath Commissioner, wrongly identified some other person as Govind Ram and got the affidavit attested by the Oath Commissioner as if it was being sworn by Govind Ram. This act of wrong identification committed by the appellant cannot amount to the offence of cheating by

personation Cheating is defined in section 415, Indian Penal Code, which is as follows —

‘Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body mind, reputation or property, is said to ‘cheat’

The ingredients required to constitute the offence of cheating are —

(i) There should be fraudulent or dishonest inducement of a person by deceiving him,

(ii) (a) The person so deceived should be induced to deliver any property to any person or to consent that any person shall retain any property, or

(b) The person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived, and

(iii) In cases covered by (i) (b), the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind reputation or property

In the present case the finding of fact recorded only shows that the Oath Commissioner was induced to attest the affidavit by the deception practised by the appellant in wrongly identifying a person as Govind Ram when he was in fact not Govind Ram. That act done by the Oath Commissioner of attesting the affidavit could not, however, possibly cause any damage or harm to the Oath Commissioner in body, mind, reputation or property. The Oath Commissioner was obviously not induced to deliver any property to anybody by this wrong identification, nor was he induced to consent that any person should retain any property. Thus the facts found did not constitute the offence of cheating at all. The conviction for an offence

under section 419, substantively or with the aid of section 109 Indian Penal Code, could only have been justified if the facts proved constituted all the ingredients of the offence of cheating. In recording the conviction, the High Court neglected to see whether all those ingredients were proved. On the face of it though the Oath Commissioner was induced to attest the affidavit by wrong identification made by the appellant, there was no likelihood of any damage or harm to him in body, mind reputation or property, so that the Oath Commissioner was never cheated. Clearly, therefore the High Court fell into an error in recording the conviction of the appellant for the offence under section 419 read with section 109, Indian Penal Code and substituting that conviction in place of the conviction for offences for which he had been punished by the trial Court.

4 We may, in this connection, take note of another error committed by the High Court though it is not material to the result of this appeal. The High Court upheld the sentence of fine of Rs 3000 awarded by the trial Court to the appellant. The trial Court had directed that, in default of payment of fine, the appellant was to undergo two years' rigorous imprisonment. The High Court made no order with regard to imprisonment in default, but, by upholding the fine awarded by the trial Court the High Court impliedly also affirmed the imprisonment to be undergone in default of payment of fine. In affirming this sentence of imprisonment in default of payment of fine, the High Court failed to notice that the sentence of imprisonment in default became illegal when the conviction was altered to one under section 419 read with section 109 Indian Penal Code. Under that section the maximum sentence of imprisonment that can be awarded is three years and, consequently, under section 65 Indian Penal Code the maximum term of imprisonment in default of payment of fine that could be prescribed was nine months, being one-fourth of three years. In approving the sentence of two years imprisonment in default of payment of fine, the High Court thus, made an order which was clearly illegal and in contravention of section 65, Indian Penal Code. The

trial Court had, of course, committed no error in awarding the sentence of two years' rigorous imprisonment in default of payment of fine because that Court had recorded conviction for five different offences, each punishable with imprisonment for seven years, and the fine of Rs. 3,000 was a part of the cumulative sentence for commission of those five offences. We have only pointed out that this error occurred, because the High Court adopted the extraordinary course of convicting the appellant for an offence with which he had never been charged, for which he had never been tried and without examining whether the ingredients of that offence were established and what was the maximum punishment that could be awarded for it. In adopting this course, the High Court, as we have indicated earlier, failed to record a clear finding whether the offences, for which the appellant had been convicted by the trial Court, were proved or not.

5. In these circumstances, the appeal is allowed, the conviction under section 419 read with section 109 of the Indian Penal Code, is set aside. The case will now go back to the High Court for rehearing the appeal and giving a decision on the appeal in respect of the offences for which the appellant was convicted by the trial Court. The appellant will continue on existing bail till the High Court orders otherwise.

V.K.

— Appeal allowed.

THE SUPREME COURT OF INDIA. (Civil Appellate Jurisdiction.)

PRESENT:—*J. C. Shah, K. S. Hegde and A. N. Grover, JJ.*

M/s. Baidyanath Ayurved Bhavan (P.) Ltd., Jhansi .. *Appellant**

v.

The Excise Commissioner, U. P. and others .. *Respondents.*

(A) *Medicinal and Toilet Preparations (Excise Duties) Act (XVI of 1955), Schedule, Item 1—Manufacture of medicinal preparation with the aid of tincture of which alcohol is a component—Preparation is liable to excise duty under Item 1.*

The language of Item 1, of the Schedule to the Act is plain and unambiguous. It imposes duty on all medicinal preparations containing alcohol. In order to attract duty all that is required is that a medicinal preparation should contain alcohol. Alcohol may be a part of the preparation either because it is directly added to the solution or it came to be included in that medicinal preparation because one of the components of that preparation contained alcohol. The contention therefore that unless alcohol is added into the preparation in its free condition a medicinal preparation does not become dutiable, is untenable.

[*Paras. 8, 9.*]

In the present case it is admitted that tincture is a component of the medicinal preparation with which we are concerned and alcohol is a component of tincture. Therefore it is difficult to see how it can be urged that those preparations do not contain alcohol.

[*Para. 8*]

(B) *Interpretation of Statutes—Taxing Act—Proper construction.*

In a taxing Act one has to look at what is clearly said; there is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing

is to be implied. One can only look fairly at the language used [Para 8]

Appeal by Special Leave from the judgment and order dated the 28th April, 1970 of the Allahabad High Court in Special Appeal No 368 of 1970

S V Gupta, Senior Advocate, (Sobhagmal Jain, with him), for Appellant

O P Rana and R Bana, Advocates, for Respondents

The Judgment of the Court was delivered by

Hegde, J.—In this appeal by Special Leave the true ambit of Item 1 in the Schedule to the Medicinal and Toilet Preparations (Excise Dunes) Act, 1955 (to be hereinafter referred to as the Act) read with section 3 (1) of that Act comes up for consideration

2 The appellant is a manufacturer of certain medicines with the aid of substances like tincture, spirit etc. The tincture and spirit in their turn contain alcohol. The Superintendent of Excise called upon the appellant to pay duty under the Act on the medicinal preparations on the ground that they contain alcohol. The appellant resisted the demand on the ground that the medicines in question were not prepared by adding pure alcohol, the fact that the tincture which is a component of that preparation contains alcohol does not make it a preparation containing alcohol. That contention was rejected by the Superintendent of Excise as well as by the High Court in the writ petition brought by the appellant

3 It is admitted that alcohol though it was not directly added is a component of the medicinal preparations in question. That alcohol has not undergone any chemical change into some other substance. It is present in a liquid form in those preparations. The question for decision is whether the preparations in question do not attract duty because alcohol was not directly added to the solution. The contention of the appellant is that unless alcohol is added into the preparation in its free condition, a medicinal preparation does not become dutiable. For deciding this question we may now read the relevant provisions of the Act

4 Section 3 (1) of the Act says

"There shall be leviable duties of excise, at the rates specified in the Schedule, on all dutiable goods manufactured in India"

5 "Dutiable goods" is defined in section 2 (c) as meaning the medicinal and toilet preparations specified in the Schedule as being subject to the duties of excise levied under this Act. "Medicinal Preparation" is defined in section 2 (g) in these words

"'medicinal preparation' includes all drugs which are a remedy or prescription prepared for internal or external use of human beings or animals and all substances intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals"

6 Item 1 of the Schedule, the only item with which we are concerned in this case reads as follows

Item No	Description of dutiable goods	Rate of duty
<i>Medicinal preparations</i>		
1	Medical preparations being patent or proprietary medicines containing alcohol and which are not capable of being consumed as ordinary alcoholic beverages	Ten per cent <i>ad valorem</i>

7 The only other provision which we need consider is section 4 of the Act. That section reads thus

"Where alcohol, opium, Indian hemp or other narcotic drug or narcotic had been supplied to a manufacturer of any dutiable goods for use as an ingredient

of such goods by, or under the authority of, the collecting Government and a duty of excise on the goods so supplied had already been recovered by such Government under any law for the time being in force, the collecting Government shall on an application being made to it in this behalf, grant

in respect of the duty of excise leviable under this Act, a rebate to such manufacturer of the excess, if any, of the duty so recovered over the duty leviable under this Act."

8. It was conceded that the preparations with which we are concerned in this case are medicinal preparations. They are proprietary medicines and that they are not capable of being consumed as ordinary alcohol beverages. The only question that has to be decided is whether those preparations contain alcohol. It is admitted that tincture is a component of that preparation and alcohol is a component of tincture. Therefore we fail to see how it can be urged that those preparations do not contain alcohol. In order to attract all duty that is required is that a medicinal preparation should contain alcohol. Alcohol may be a part of the preparation either because it is directly added to the solution or it came to be included in that medicinal preparation because of one of the components of that preparation contained alcohol. According to the plain language of the provision all that is required is that the preparation should contain alcohol. In interpreting a taxing provision, the Courts should not ordinarily concern themselves with the policy behind the provision or even with its impact. As observed by Rowlatt, J., in *Cape Brandy Syndicate v. Commissioners of Inland Revenue*¹, in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. It was urged on behalf of the appellant that if we hold that even indirect introduction of alcohol into a medicinal preparation brings that preparation within the scope of section 3 (1) of the Act, it would mean multi-point taxation. Coming to the medicinal preparations with which we are concerned in this case, it was urged that if the view taken by the High Court is correct then, first the tincture used became dutiable and thereafter the medicinal preparations in which tincture was used became dutiable. It was said

that that could not be the intention of the Parliament. We are unable to appreciate this contention. Multi-point taxation is not unknown to us.

9. Our attention was invited to section 4 of the Act in support of the contention that the Legislature did not intend to levy multipoint tax. Section 4 provides for rebate of duty on alcohol supplied to the manufacturer of dutiable goods for use as an ingredient of such goods by or under the authority of the collecting government and a duty of excise on goods so supplied had already been recovered by such government under any law for the time being in force. In our opinion this provision instead of supporting the appellant goes to show that multipoint tax on medicinal preparations containing alcohol was within the contemplation of the Legislature. Otherwise there was no purpose in incorporating section 4 into the Act. If section 3 did not impose any levy on medicinal preparations of which pure alcohol is not a component, there was no need for section 4. There can be no question of any rebate if there was no levy at all. Every rebate presupposes an imposition of tax or duty. But the rebate under section 4 is confined only to those goods which directly come within the scope of section 4 and not to others. That was the will of the Parliament. If the Parliament desired to give rebate only in certain cases not to others, it cannot be said that as regards the other medicinal preparations there can be no levy. In our judgment the language of the provision imposing the levy is plain and unambiguous. It imposes duty on all medicinal preparations containing alcohol. At the hearing our attention was invited to the decision of the Madras High Court in *M/s. Pharm Products Ltd., Thanjavur and others v. District Rev. Officers*¹. The conclusion reached by that High Court accords with our conclusion.

10. In the result this appeal fails and the same is dismissed with costs.

V.K.

Appeal dismissed.

1. (1968) 2 M.L.J. 395: A.I.R. 1969 Mad. 448.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —G K Mitter and A N Ray JJ

Dr Kulbhushan Kunwar Appellant*

Smt Raj Kumari and another Respondents

Hindu Adoptions and Maintenance Act (LYXVIII of 1956) section 23 (2)—Scope—Maintenance of wife and daughter—Quantum—Relevant considerations

Maintenance depends upon a gathering together of all the facts of the situation the amount of free estate the past life of the married parties and the families a survey of the conditions and necessities and rights of the members on a reasonable view of change of circumstances possibly required in the future regard being had to the scale and mode of living and to the age habits wants and class of life of the parties [Para 17]

Mt Ekrareshwari v Homeshwar L.R. 56 I.A. 182 57 M.L.J. 50 AIR 1929 P.C. 128 followed

In the instant case the High Court fixed a sum of Rs. 250 per month for the maintenance of the wife subject to the limit of 25 per cent. of the income of husband as found by the Income tax authorities and Rs. 150 per month for the maintenance of the daughter till such time as she married but so as not to exceed 15 per cent. on the average monthly income of the father. This order was upheld by the Supreme Court [Paras 21, 22]

Appeals from the Judgments and Decrees dated the 10th March 1965 of the Allahabad High Court Lucknow Bench in First Civil Appeals Nos. 5 and 6 of 1958 respectively

G N Dixit and B Datta Advocates for Appellant (In both the Appeals)

C B Agarwala Senior Advocate (Miss Uma Mehta S A Bagga and Mrs S Bagga Advocates with him) for the Respondents (In both the Appeals)

The Judgment of the Court was delivered by

Mitter, J.—These two appeals are from two judgments and decrees of the High Court of Allahabad granting maintenance to the wife and daughter of the common appellant in both the appeals

2 Counsel for the appellant did not contest the right of the respondents to claim maintenance. His argument was directed only against the quantum fixed in both the cases on the ground that the principles laid down in section 23 (2) of the Hindu Adoptions and Maintenance Act, 1956 had not been followed by the High Court. The Act had come into force before the date of the trial Court's judgment on the 1st June, 1957 and it is the common case of the parties that the Act governs the rights of the parties herein. The relevant portion of section 23 runs as follows —

'(1) It shall be in the discretion of the Court to determine whether any and if so what maintenance shall be awarded under the provisions of this Act and in doing so the Court shall have due regard to the considerations set out in sub-section (2) or sub-section (3), as the case may be as far as they are applicable

(2) In determining the amount of maintenance if any to be awarded to a wife children or aged or infirm parents under this Act regard shall be had to—

(a) the position and status of the parties,

(b) the reasonable wants of the claimant

(c) if the claimant is living separately whether the claimant is justified in doing so

(d) the value of the claimants' property and any income derived from such property or from the claimant's own earnings or from any other source,

(e) the number of persons entitled to maintenance under this Act

* * *

As it was contended on behalf of the appellant that practically all the provisions of the sub-clauses of sub-section (2) were disregarded by the High Court, it is

* C.A. Nos. 2564 and 2589 of 1966

20th October 1970

necessary to state a few facts about the married life of the appellant, his income out of which maintenance is to be directed, the pecuniary conditions of himself and of his wife and whether the wife has any other income or property which had to be taken into consideration.

3. The marriage of the appellant with the respondent in the first appeal took place in May 1945 at Gujranwala, now in Pakistan. The father-in-law of the appellant who was examined as a witness in the maintenance suit filed by the respondent gave evidence to the effect that he had worked as an agent of the Standard Vacuum Oil Company with agencies at Gujranwala and neighbouring districts and that his annual income at the date of the marriage of the respondent was about Rs. 40,000 out of which he had to pay Rs. 13,000 by way of income-tax. Further, after the partition of India he came to Dehra Dun and took up his abode at Premnagar Refugee Camp but could not engage himself actively in business on account of illness and old age but had become a partner with others in a business of ice and rice mill in which he had a Rs. 0-2-6 share; he had never seen the accounts of the business and was content to accept whatever was given to him by his partners which varied between Rs. 50 and Rs. 200 per month. He had to leave all his property in Pakistan and had not received any compensation in lieu thereof at the date when he was examined in Court in March, 1956.

4. There is some dispute about the period during which the parties in the first appeal had lived together as man and wife. According to the husband the period had come to an end in March, 1946 while according to the wife it had lasted up to December, 1946. Admittedly, a daughter, the respondent in the second appeal, was born out of the wedlock on 4th August, 1946. The wife sent a lawyer's notice claiming maintenance on 28th July, 1951 and filed a suit for the purpose adding a claim to ornaments which according to her were left with the husband. The lawyer's notice states that the news of the birth of the daughter had been conveyed to the parents by his father-in-law by registered post but the latter had refused to accept it, that the wife had been sent by the appellant to Gujranwala for the confinement in 1946

and all her *stridhana* jewellery, silk clothes etc. had been left behind with the appellant at Lucknow. On the basis that the appellant was receiving Rs. 560 per month as salary from Government and was earning Rs. 800 per month by way of private practice besides income from agricultural lands, the wife's claim to maintenance was laid at the rate of half the earnings of the husband inclusive of the maintenance of the minor girl who had to be educated and brought up according to the husband's status in life.

5. The suit for maintenance was actually filed on 27th April, 1954 by the wife claiming besides the value of the ornaments a decree for arrears of maintenance amounting to Rs. 21,600 and future maintenance at the rate of Rs. 600 per month. The claim, made in daughter's suit filed on 5th April, 1955 was at the rate of Rs. 150 per month.

6. The trial Court decreed the two suits awarding maintenance to the wife at Rs. 100 per month as from the date of the decree, *i.e.*, 1st June, 1957 and at the rate of Rs. 25 per month for the daughter negating the claim to the value of the ornaments.

7. The High Court allowed the claim of the wife to a monthly maintenance of Rs. 250 from the date of the institution of the suit subject to a limit, *i.e.*, that the husband would not be liable at any time to pay more than 25 per cent. of the total income as accepted by the income-tax authorities by way of maintenance. With regard to the daughter, the High Court fixed the amount of maintenance at Rs. 150 per month subject to a similar limit as in the case of the wife, the quantum being directed not to exceed 15 per cent. of the average monthly income of the father.

8. The relevant facts as they emerge from the oral and documentary evidence adduced by the parties so far as the same have a bearing on the factors mentioned in sub-clause (a) to (d) of section 23 (2) besides the above may be stated briefly. We have already noted that the father of the wife was a fairly well-to-do person at the time when the marriage had taken place. There was, however, a serious reversal of his fortunes after the partition of the country. According to him no talk of any dowry had taken place between

the parties before the marriage of his daughter. The appellant who had qualified himself in medicines had gone to Gujranwala from Lucknow for the marriage. The appellant's mother had seen the respondent several times before the nuptials. His daughter had accompanied the appellant to Lahore immediately after the marriage but had come back from there within 10 to 15 days.

9 The respondent's evidence was that except for very brief periods from October 1945 to March 1946 she had scarcely lived with her husband who was working in a medical college at Lucknow starting on a salary of Rs 280 per month. Her evidence was that she was not well received in her husband's family because her mother-in-law was disappointed with the dowry brought by her.

10 From the oral and documentary evidence it appears that the husband was never anxious to have the company of the wife and her attempts to make the married life a normal one by going to Lucknow three times did not have the desired effect. The husband used to write to her but stopped doing so some two months after the birth of her daughter in August 1946. She had written a number of letters to her husband from 1946 to 1949 without receiving any reply. On the last occasion when she had gone to the husband at Lucknow the latter was absent from home for four days and she could not find out whether he was attending his college during that time. The husband had met her at Lucknow when she went there with her daughter but made himself scarce after the first day. The husband's evidence shows clearly that he was disillusioned about the wife immediately after the marriage inasmuch as he found the wife to be a girl of little education whereas he had been given to understand that she had taken a master's degree in arts. He had however, tried to reconcile himself with his lot. His statement even in examination in chief does not show that he was at any time anxious to receive his wife or to keep her with him. He had kept up correspondence with her till August 1946 when he received a registered letter intimating him of the birth of his daughter. For five years thereafter, i.e., from the time of the partition of the country, he had no news of his wife and child. In 1951 he received the lawyer's

notice. At the time of his marriage he was a resident medical officer drawing a fixed salary of Rs 280 p.m. with free quarters. He became a lecturer in medicine in December 1945 on a salary of Rs 280 with prospects of increment up to Rs 400. In 1953 he became a Reader in Medicine on a scale of Rs 500 30 800. His salary at the time of his giving evidence in Court was Rs 620 plus 10 per cent by way of dearness allowance. He also had some private practice which came to no more than Rs 25 000 to Rs 30 000 during the entire period from 1945 to 1957. His bank balance had never crossed the limit of Rs 2 000. He had no other assets except a piece of land in Ambala given by way of compensation for lands owned in Pakistan. He had purchased a car for Rs 10 000 and his monthly expenses for the upkeep of it including the chauffeur's pay was Rs 70 p.m. He had no idea of the financial status of his father-in-law.

11 A few letters which passed between the husband and the wife and exhibited in this case show that from May 1945 to October 1945 the husband was writing quite affectionate letters to the wife. There were only two short letters written on the 3rd and 4th January, 1946 written in an altogether different vein. The copy of the only letter of the wife which was exhibited in this case bears date 25th August, 1943 starts off with congratulations to the husband for having received a scholarship for going to England as reported in the 'Tribune'. She complained that the husband had forgotten her although she still loved him as usual. She mentioned that the daughter was always asking after her father. She requested the husband to look them up before going abroad. She also sent her respects to her mother-in-law.

12 It will be noted that the documentary evidence noted above was of a period prior to the litigation. The wife complained in the plaint about the strained relations between herself and her mother-in-law on the ground of insufficiency of dowry that though she had gone to the husband and tried to persuade him to do his duty by her it was of no avail and that she was living upon the charity of her father. The husband pleaded in defence that the wife had gone to him in October 1945 of her own accord without any traditional

invitation and had stayed with him for some time off and on up to March, 1946 adding:

“During this period the defendant (himself) was constantly under threat to his life being in danger and used to take all sorts of precautions and it became further clear on account of the incompatibility of temperament that the defendant would not be able to pull on with the plaintiff.”

13 Taking all the circumstances into consideration and specially the status of the father of the respondent that he was giving her a sum of Rs. 250 p.m. by way of pocket expenses, the Civil Judge, Lucknow fixed the wife's maintenance at Rs. 100 per month and that of the daughter at Rs. 25 p.m. The High Court held that it was the husband who was guilty of desertion and the wife was entitled to all the amenities and comforts which would have been hers had they lived together. The High Court also found that the total income in the year 1953-54 was Rs. 10,099 and that in 1957 he was receiving a salary of Rs. 682 per month and that his private practice which was of the order of Rs. 250 per month in 1953-54 could be reasonably expected to have gone up much higher in 1957. Accordingly it fixed up a monthly allowance to the respondent at Rs. 250 for maintenance subject to a limit of 25 per cent. per month of the total income as accepted by the income-tax authorities.

14. Before us Counsel for the appellant contended that the Courts below had ignored the fact that on the death of the wife's father in 1960 she had inherited half the properties left by him and that even during his lifetime she was in receipt of Rs. 250 per month, which should have been taken into consideration under clause (d) of sub-section (2) of section 23. We cannot accept this contention. A sum of Rs. 250 per month even if given to the respondent regularly was not her income but was only a bounty from her father with she might or might not continue to get. It is hardly believable that the father who according to his own evidence was getting no more than Rs. 200 per month out of the partnership business could afford to give Rs. 250 per month to his daughter. It would appear this statement was false and only made with a view to strengthening a claim for the recovery of

the amount from the husband. If it were true that the wife had inherited any property from her father there certainly was ample opportunity for the husband to have affirmed an affidavit to that effect during the last ten years. Such affidavit could have been used even before the High Court of Allahabad which heard the appeal in 1965.

15. With regard to sub-clause (c) the evidence makes it quite clear that it was the husband who did not want the wife to live with him. The husband never seemed to have cared for the daughter born to him. The fact that a registered letter was sent to him after the birth of the daughter shows that there was complete estrangement between the parties even before that day. Neither in the letters written to her nor in the evidence adduced by the husband is any reason disclosed as to why he took a dislike to the wife unless it be a fact that he was disappointed in his wife and cherished a feeling that she was not possessed of culture and education of the expected standard. There does not appear to be any substance in the wife's allegation that indifference of her husband stemmed from disappointment in the dowry brought by her.

16. Counsel for the appellant also relied on sub-clause (e) to sub-section (2) on the ground that he had to maintain his aged mother. Unfortunately however the husband had laid no ground to such a claim in his testimony before the Court. He was not the only son of his mother and it appears from the evidence given by him that his family owned some lands which were being looked after by the mother. In the absence of any express statement by the husband himself in his examination no reliance can be placed on the claim made on his behalf.

17. Reference was made on behalf of the appellant to the decision of the Judicial Committee in *Mt. Ekraleshwari v. Homeshwar*¹, where the Board had to deal with the case of a widow of a deceased in the junior line of the well-known Darbhanga family in Bihar. The trial Court had found in that case that the gross income of the estate was Rs. 1,50,000 per annum, but the net income was only

1. I.R. 56 I.A. 182: 57 M.L.J. 50. A.I.R. 1929 P.C. 128.

Rs 33,000 per annum after payment of the interest on the heavy encumbrances on the estate in respect of which litigation was pending between the estate and the Maharaja of Darbhanga. In rejecting the claim of the widow to an annual maintenance of Rs 18 000 and upholding the concurrent findings of the Courts in India that maintenance allowance should be fixed at Rs 4 200 per annum the Board approved of the observations of the Subordinate Judge to the effect that the said sum would enable the lady 'to live as far as may be consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's lifetime'. According to the Board maintenance depended

'upon a gathering together of all the facts of the situation the amount of free estate the past life of the married parties and the families a survey of the conditions and necessities and rights of the members on a reasonable view of change of circumstances possibly required in the future regard being of course, had to the scale and mode of living and to the age, habits wants and class of life of the parties'

With respect we are in entire agreement with the above dictum and in our view sub-section (2) of section 23 makes no departure from the principles enunciated by the Board, except perhaps to a limited extent envisaged in sub-clause (d) and (e) of the said sub-section

18 It was argued before us that inasmuch as the Board allowed as quantum of maintenance 1/8th of the net income of the estate we should adopt the same rate. In our view the Board laid down no principle related to the proportion of the free income allowable by way of maintenance from the estate. It is to be borne in mind that the maintenance claim was by a widow of a Brahmin family although highly placed in life. Here we have the case of a wife who was neglected by her husband not in affluent circumstances but certainly with means to support a wife on a reasonable scale of comfort

19 It was further argued before us that the High Court went wrong in allowing maintenance at 25 per cent. of the income of the appellant as found by the Income-

tax Department in assessment proceedings under the Income tax Act. It was contended that not only should a deduction be made of income-tax but also of house rent, electricity charges the expenses for maintaining a car and the contribution out of salary to the provident fund of the appellant. In our view some of these deductions are not allowable for the purpose of assessment of 'free income' as envisaged by the Judicial Committee. Income tax would certainly be deductible and so would contributions to the provident fund which have to be made compulsorily. No deduction is permissible for payment of house rent or electricity charges. The expenses for maintaining the car for the purpose of appellant's practice as a physician would be deductible only so far as allowed by the Income tax authorities i.e. in case the authorities found that it was necessary for the appellant to maintain a car

20 The question as to the date from which maintenance would be claimable was also mooted before the Judicial Committee in the above case. The High Court had turned down the widow's claim to arrears of maintenance. Examining the several decisions cited before it the Board took the view that the widow was entitled to maintenance not from the date of the decree as found by the Courts below nor from the date of the suit in April 1922 but from 1st of January, 1922 in view of the fact that it was towards the end of the year 1921 when the widow had made up her mind to stay on at her father's place. In this case as already noted the claim to maintenance was first laid by a lawyer's notice of 1951 but the suit was filed in 1954. The trial Court decreed maintenance from the date of the decree in 1957 but the High Court thought fit to allow maintenance from the date of the institution of the suit. No exception can be taken to the fixing of the date of institution of the suit as the *terminus a quo* for the maintenance claimed by the respondent

21 A sum of Rs 250 per month for the maintenance of the wife of a person occupying the position of the appellant cannot be said to err on the liberal side. The High Court in our opinion very rightly fixed that sum making it subject to the limit of 25 per cent. of the income as found

by the Income-tax authorities. We have no reason to take any different view. Subject to our observation as to the determination of the income of the appellant, the appeal against the wife is dismissed with costs.

22. As regard the appeal in the case of the daughter, the High Court fixed the amount of monthly maintenance at Rs. 150 till such time as she marries but so as not to exceed 15 per cent. on the average monthly income of the father. No ground was shown as to why we should make a variation in the amount fixed in her case. We uphold the finding of the High Court in this respect. There will be one set of hearing fee.

V.K.

Appeals
dismissed.

THE SUPREME COURT OF INDIA. (Civil Appellate Jurisdiction.)

PRESENT :—*J. C. Shah, K. S. Hegde and A. N. Grover, JJ.*

State of Assam and another *Appellants**
v.

Daksha Prasad Deka and others
Respondents.

Constitution of India (1950), Article 311 (2) — Financial Rule 56 (a)—Public servant disputing his age as entered in service record—Compulsory retirement under Financial Rule 56 (a) on the basis of service record—Article 311 (2) if infringed—Duty of State to give opportunity to public servant concerned to prove his case.

The date of compulsory retirement under F.R. 56 (a) must be determined on the basis of the service record and not on what the public servant claimed to be his date of birth, unless the service record is first corrected consistent with the appropriate procedure. A public servant may dispute the date of birth as entered in the service record and may apply for correction of the record. But until the record is corrected, he cannot claim that he has been deprived of the

guarantee under Article 311 (2) of the Constitution by being compulsorily retired on attaining the age of superannuation on the footing of the date of birth entered in the service record. [*Para. 4.*]

It is true that ordinarily when an application is made for rectification of age by a public servant concerned, the State should give the applicant proper opportunity to prove his case and should give due consideration to the evidence brought before it. But in the present case, since the application for rectification was made within three years before the date of actual superannuation, according to S.R. 8 Note, the application could not be entertained. Hence the order compulsorily retiring the respondent without giving him an opportunity to prove his true age did not infringe the guarantee of Article 311 (2) of the Constitution. [*Paras. 5 and 7.*]

Appeal by Special Leave from the Judgment and Order, dated the 10th January, 1966 of the Assam and Nagaland High Court in Civil Rule No. 266 of 1965.

Naunit Lal, Advocate, for Appellant.

R. Gopalakrishnan, Advocate, for Respondent No. 1.

The Judgment of the Court was delivered by

Shah, J.—Daksha Prasad Deka—herein after called ‘the respondent’—was appointed Assistant Sub-Inspector of Police with effect from 17th January, 1929. On a representation made by the respondent the date of his birth was entered in the service record as 1st July, 1910. Under F.R. 56 (a) the respondent was liable to be compulsorily retired on 1st July, 1965. In 1955 the respondent applied that the date of birth entered in his service record, be shown as 1st August, 1911. That application was rejected. The respondent again applied in 1963 for correction of his date of birth. The application was rejected and by order, dated 26th June, 1965, the respondent was informed that he will stand superannuated on 30th June, 1965, his representation made to the Government of Assam against that order was unsuccessful.

2. The respondent then applied to the High Court of Assam praying for a writ

*C.A. No. 2265 of 1966. 23rd October, 1970.

in the nature of *mandamus* requiring the State of Assam to forbear from giving effect to the order, dated 26th June, 1965. The High Court quashed the order dated 26th June 1955, and directed the State of Assam to give an opportunity to the respondent to show cause against the order directing compulsory retirement and an opportunity to prove his true date of birth. Against that order this appeal is preferred with Special Leave.

3 In the opinion of the High Court if the true date of birth of the respondent was 1st August 1911 the order compulsorily retiring the respondent on 30th June, 1965, without giving him an opportunity to prove his true age, infringed the guarantee of Article 311 (2) of the Constitution. In our judgment the High Court was wrong in holding that there was any infringement of Article 311 (2) of the Constitution.

4 In the service record of the respondent his date of birth was recorded as 1st July 1910 and under F R 56 (a) the respondent was liable to be compulsorily retired on the date on which he attained the age of 55 years. The date of compulsory retirement under F R 56 (a) must in our judgment be determined on the basis of the service record and not on what the respondent claimed to be his date of birth unless the service record is first corrected constitutionally with the appropriate procedure. A public servant may dispute the date of birth as entered in the service record, and may apply for correction of the record. But until the record is corrected he cannot claim that he has been deprived of the guarantee under Article 311 (2) of the Constitution by being compulsorily retired on attaining the age of superannuation on the footing of the date of birth entered in the service record.

5 It is true that the state authorities did not give to the respondent an opportunity to support his case that he was born on 1st August 1911 and that the service record was erroneous. But in view of S R. 8 Note which governed the employment of the respondent an application for correction of the service record could not be entertained if it was made within three years before the date of 'actual superannuation', S R. 8 Note provides

"No alteration in the date of birth of a Government servant should be allowed except in very rare cases where a manifest mistake has been made. Such mistakes should be rectified at the earliest opportunity in the course of—(1) periodical reattestation of the entries in the first page of service book, and (2) preparation of the annual detailed statement of a permanent establishment (Financial Rule, Form No II) in which is noted the date of incumbent's birth. In no case the request for change in the date of birth of a Government servant made on a date within three years of the date of his actual superannuation should be entertained."

Validity of the Rule is not challenged by the respondent. We are unable to agree with the view of the High Court that the date of 'actual superannuation' within the meaning of S R. 8 Note is the date of superannuation computed with reference to the claim made by the public servant and not with reference to the date as entered in the service record. If such an interpretation be accepted, S R. 8 Note would prove in a majority of cases of no practical utility. It is intended by S R. 8 Note that any error in the service record shall be rectified at the earliest opportunity and in no case should an application for rectification be entertained within three years of the 'date of actual superannuation', i.e. the date of superannuation according to the service record.

6 Again, if the contention of the respondent were correct on the date on which he entered service he was a minor. If on a representation that he had attained the age of majority on the date on which he entered service, it would not be open for him after being admitted to the service to contend that under the appropriate service rules he could not have been admitted to the service but for the misrepresentation made by him.

7 Counsel for the respondent relied upon the judgment of this Court in *State of Orissa v. Dr. (Miss) Binapani Dei and others*¹ in support of the contention that a public servant must be given an opportunity to prove his true date of birth

before he is superannuated, and any order passed without such opportunity is illegal. In our judgment *Dr. (Miss) Binapani's case*¹ enunciates no such proposition. In that case in the service record of a public servant, 10th April, 1910 was entered as the date of her birth. An enquiry was held and the public servant was required to show cause why her date of birth should not be accepted as 4th April, 1907. Thereafter the Government of Orissa determined her date of birth as 16th April, 1907, and declared that she should be deemed to have been superannuated on 16th April, 1962. This order was challenged by the public servant in a petition to the High Court of Orissa. The High Court held that the order of the State Government amounted to compulsory retirement before she attained the age of superannuation and was contrary to the rules governing her service conditions and amounted to removal within the meaning of Article 311 of the Constitution, and since she was not given a reasonable opportunity of showing cause against the action proposed to be taken in regard to her, the order was invalid. This Court confirmed the order passed by the High Court of Orissa. It was observed by this Court that even an administrative order which involved civil consequences must be made consistently with the rules of natural justice. The person concerned must be informed of the case of the State and the evidence in support thereof and must be given a fair opportunity to meet the case before an adverse decision is taken. The public servant, according to the service record, could not be superannuated before 10th April, 1965. But by an enquiry which was not held in a manner consistent with the rules of natural justice an order was made altering the date of birth as entered in the service record, and declaring that she was born in 1907. That was plainly an order passed to the prejudice of the public servant without giving an opportunity to meet the case of the State. In the present case, however, the State did not seek to modify the service record; it was the respondent who sought modification of the service record and claimed that he be declared superannuated only on the basis of the rectification prayed for by him. It is true that ordinarily when an

application is made for rectification of age by a public servant, the State should give the applicant proper opportunity to prove his case and should give due consideration to the evidence brought before it. But in the present case, since the application for rectification was made within three years of the date of actual superannuation, according to S.R. 8 Note the application could not be entertained. The principle of *Dr. (Miss) Binapani's case*¹ has no application to this case.

8. The appeal is allowed and the order passed by the High Court is set aside. The petition filed by the respondent shall stand dismissed. There will be no order as to costs throughout.

V.K.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—J. M. Shelat and C. A. Vaidialingam, JJ.

Joginder Singh

*Appellant**

v.

State of Himachal Pradesh Respondent.

Army Act (XLVI of 1950), sections 125 and 126—Applicability and Scope—Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules (1952), Rules 3 and 4—Offence which could be tried both by a criminal Court as well as a Court-martial—Discretion to decide forum lies with officer mentioned in section 125—Such officer not exercising his discretion—Section 126 not attracted—Military authorities surrendering accused knowing full well nature of charge against accused—Section 126 or Rule 4 not attracted—Trial by criminal Court without following procedure under section 126 or Rule 4 not vitiated.

In respect of an offence which could be tried both by a criminal Court as well as a Court martial, sections 125 and 126 of the Army Act and Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules (1952) have made suitable provisions to avoid a conflict of jurisdiction between the

1. (1967) 2 S.C.J. 339: (1967) 2 S.C.R. 625.

1. (1967) 2 S.C.J. 339 : (1967) 2 S.C.R. 625.
*Crl.A. No. 34 of 1969. 30th November, 1970.

ordinary criminal Courts and the Court-martial. But it is to be noted that in the first instance discretion is left to the officer mentioned in section 125 to decide before which Court the proceedings should be instituted. It is only when he so exercises his discretion and decides that the proceeding should be instituted before a Court-martial that the provisions of section 126 (1) come into operation. If the designated officer does not exercise his discretion and decide that the proceedings should be instituted before a Court martial, the Army Act would not obviously be in the way of a criminal Court exercising ordinary jurisdiction in the manner provided by law. [Para 22]

When the competent military authorities knowing full well the nature of the offence alleged against the accused had released him from military custody and handed him over to the civil authorities the Magistrate would be justified in proceeding on the basis that the military authorities had decided that the accused need not be tried by the Court martial and that he could be tried by the ordinary criminal Court. In such a case there is no occasion to follow the procedure under section 126 of Army Act or Rule 4 of the Criminal Courts and Court martial (Adjustment of Jurisdiction) Rules. [Paras 29 and 31]

Appeal for the Judgment and Order, dated the 26th July 1968 and 27th September, 1968 of the Delhi High Court, Himachal Bench at Simla in Criminal Revision No 26 of 1968

R L. Kohli, Advocate for Appellant

V C Mahajan and R N Sachthey, Advocates, for Respondent

The Judgment of the Court was delivered by

Vaidalingam J—In this appeal on certificate issued by the Delhi High Court the appellant who is governed by the Army Act 1950 (hereinafter referred to as the Act) challenges the legality of his trial and conviction for an offence under section 376 Indian Penal Code by the Assistant Sessions Judge Nahan

2 The main attack levelled against the proceedings is that the material provisions of the Army Act read with the Criminal Courts and Court martial (Adjustment of

Jurisdiction) Rules, 1952 (hereinafter referred to as the Rules) framed by the Central Government under section 549 (1), Criminal Procedure Code have not been complied with by the Assistant Sessions Judge. The prosecution case is briefly as follows

3, The appellant was a military personnel attached to Punjab Regiment No 24, which moved to Nahan on 3rd March 1967. The appellant was a Lance Naik and was appointed as a temporary Granthi of the Katcha Johar temple used by the military personnel. One Jiwa Nand with his wife and children was living close by the temple. On 8th March, 1967 at about 8.30 A.M. Gayatri Devi aged about 10 years and daughter of Jiwa Nand was called by the appellant and when she came near him she was taken inside the adjoining room where the appellant had forcible sexual intercourse with her. The victim narrated the occurrence to her mother and sister. When Gayatri Devi, her mother and certain others were proceeding towards the Cantonment to complain to the military authorities they met 4 or 5 Sikh gentlemen and Gayatri Devi pointed out the Appellant in that group as the one who had misbehaved with her. The Sikh gentlemen, who were in military uniform declined to permit Gayatri Devi and others to go inside the Cantonment area on the ground that the entry into the same was prohibited to non military personnel. Later on the father of Gayatri Devi took her to the police station and lodged a report Ex 12/A. The accused pleaded *alibi* and denied the offence. He also let in defence evidence. The learned Assistant Sessions Judge accepted the prosecution case and disbelieving the plea of the appellant convicted him of the offence under section 376 Indian Penal Code and sentenced him to three years rigorous imprisonment. The appeal filed by the appellant was dismissed by the learned Sessions Judge who confirmed the conviction and sentence.

4 The appellant filed a criminal revision No 26 of 1968 before the Delhi High Court, challenging his conviction and sentence passed by the learned Assistant Sessions Judge and as confirmed by the learned Sessions Judge. The learned Chief Justice before whom the criminal revision came for hearing held that the conviction of the appellant for the offence under section 376 Indian Penal Code and

the sentence imposed on him by the two subordinate Courts on facts were justified and did not require any interference. However, a plea was taken before the learned Chief Justice on behalf of the appellant that according to a notification issued by the Ministry of Defence, Government of India, dated 28th November, 1962, the appellant on the material date must be considered to have been on active service. Based on this notification it was further urged that the appellant's trial should have been before a Court-martial and that if the Assistant Sessions Judge decided to proceed with the trial, he should have given the required notice to the Commanding Officer of the Army as is mandatory under section 126 (1) of the Act read with rule 4. As those provisions have not been complied with, the appellant's trial and conviction were illegal and null and void. The learned Chief Justice was, however, inclined to take the view that the omission by the Assistant Sessions Judge to follow the procedure indicated above does not affect his jurisdiction to conduct the trial.

5. In view of certain decisions of the High Courts wherein an opinion has been expressed that non-compliance with the provisions of the Act and the Rules vitiates the trial of a military personnel by the criminal Courts, the learned Chief Justice referred the matter, by his order, dated 25th June, 1968, to a Full Bench. The Full Bench which consisted of the learned Chief Justice Kapoor and Tatachari, JJ., heard the criminal revision case. The learned Chief Justice and Tatachari, J. after a very elaborate reference to the material provisions of the Act and the relevant Rules held that the magistrates before conducting a trial of a military personnel have to normally conform to the relevant provisions of the Act and the Rules. But they held that in respect of offences for the trial of which both the Court-martial and an ordinary Criminal Court had concurrent jurisdiction, the mere omission by a magistrate, before conducting the trial, to issue the necessary notice under Rule 4 will not vitiate the proceedings are being illegal. Kapoor, J., on the other hand, disagreed with the majority opinion and held that under the Act read with the rules, the first option to try a military personnel lies with the Army

authorities and they have to decide the forum of the trial and that the magistrate will get jurisdiction only after a decision in his favour by the Central Government in case of a conflict between the army authorities and the Magistrate. The learned Judge further held that a magistrate cannot assume jurisdiction straightaway without providing an opportunity to the military authorities to decide the forum. The learned Judge accordingly held that the observance of the Rules is obligatory and non-observance thereof makes the trial illegal. In accordance with the majority judgment, the High Court by its order, dated 26th July, 1968 held that non-observance of rules 3 and 4 of the Rules does not by itself deprive the magistrate of his inherent jurisdiction or make the proceedings conducted by him null and void. The High Court further held that the effect of the violation is to be determined on the facts and circumstances of each case keeping in view the nature of the violation and all other relevant factors. After expressing opinion on the legal aspects, the case was remitted to the Single Judge for final disposal.

6. The matter came again before the learned Chief Justice, who by his order, dated 27th September, 1968 held that the trial by the Assistant Sessions Judge without conforming to the provisions of rule 4 has not caused any failure of justice to the appellant in this case. The learned Chief Justice further held that in view of certain circumstances it is legitimate to infer that there has been substantial compliance with the statutory provisions. Finally the learned Chief Justice held that the conviction of the appellant was proper and dismissed the revision filed by the appellant.

7. Mr Kohli, learned Counsel for the appellant, has reiterated the same objections taken on behalf of the appellant before the Delhi High Court. According to Mr. Kohli, the offence in this case being one which could be tried, both by the Court-martial and the ordinary criminal Court. It was for the competent officer to decide, in the first instance, whether the appellant is to be tried by a Court-martial. If the criminal Court was of the opinion that the proceedings should be instituted before itself in respect of the

offence alleged, it should have followed the mandatory provisions contained in section 126 of the Act read with rules 3 and 4

8 Under section 549 (1) Criminal Procedure Code, the magistrate was bound to have regard to the rules. In this case inasmuch as the said procedure had not been followed and the appellant accused was tried straightaway by the criminal Court the trial is illegal and void. Being a question of jurisdiction the objection raised by the appellant before the High Court goes to the root of the matter and vitiates the entire proceedings.

9 Mr V C Mahajan learned Counsel for the State on the other hand urged two contentions (i) as held by the High Court there has been a substantial compliance with the provisions of the Act and the Rules in this particular case and hence the trial by the Assistant Sessions Judge is legal and valid and (ii) even assuming that there has been a breach of the rules such a violation is at the most only an irregularity and not an illegality, and as no prejudice has been shown to have been caused to the accused by such an irregular proceeding held by the Assistant Sessions Judge the conviction is legal.

10 At the outset we may state that the question regarding the competency of the criminal Court to try the appellant does not appear to have been raised before the learned Assistant Sessions Judge. It is no doubt seen that the learned Assistant Sessions Judge, appears to have made enquiries from the Counsel appearing for the appellant and the State regarding the position of the appellant who was in military employ. The Public Prosecutor drew the attention of the Court to section 70 of the Act and appears to have pointed out that as the Punjab Regiment No 24 to which the appellant was attached was not on active service, the appellant could be tried by the ordinary criminal Court.

11 On behalf of the appellant it was urged that in view of the declaration of Emergency the appellant must be deemed to be on active service. But this contention was not accepted by the Court. Nahan station where the Punjab Regiment was then stationed being a rest station the Court proceeded with the trial reserving

liberty to the Counsel for both the parties to raise any further point before the close of the trial to establish that the appellant must be considered to be 'on active service'. Obviously neither party cared to place any material before the Court and the trial was proceeded with resulting in the conviction of the appellant.

12 Mr Kohli, learned Counsel for the appellant have drawn our attention to certain decisions of the High Court in support of his contention that a trial held by a magistrate without conforming to the provisions of the Act and the Rules is illegal and not a mere irregularity. Those decisions are *In re Captain Hugh May Stollery Munday and another*¹, *Major P K Mistry*², *C Ramanujan v State of Mysore*³, *Major Gopinath v The State of Madhya Pradesh and another*⁴ and *Awadh Behari Singh v The State*⁵.

13 On the other hand Mr Mahajan drew our attention to the Full Bench decision of the Punjab and Haryana High Court reported in *Ajit Singh v State of Punjab*⁶ wherein the High Court has held that the trial suffers not from an illegality but only an irregularity. Such an irregularity does not render the trial liable to be set aside, unless it is shown that prejudice has been caused to the accused.

14 In view of certain decisions of this Court to which we will presently refer and having regard to the particular circumstances of this case we do not think it necessary to consider the question whether non observance of the Rules by the magistrate trying and convicting a person who is governed by the Act is illegal or only irregular. The scheme of the Act and the Rules have been considered in three decisions of this Court, which are being referred to presently and hence we do not think it necessary to either quote sections 125 and 126 or section 549 Criminal Procedure Code. We will however, refer to the relevant rules at the appropriate stage. They have been referred to in particular in the latest decision of this

1 I.L.R. (1946) Mad 138 (1945) 1 M.L.J.
 2 A.I.R. 1945 Mad 289
 3 (1949) 2 M.L.J. 44
 4 (1963) M.L.J. (Cr.L.) 284 A.I.R. 1962 Mys 196
 5 A.I.R. 1963 MP 249
 6 A.I.R. 1967 Cal 323
 7 A.I.R. 1970 Punj & Har 351

Court in *Som Datt Datta v. Union of India and others*¹.

(c) at a frontier post specified by the Central Government by notification in this behalf."

15. There is no controversy that the appellant is one subject to the Act as a person enrolled under the Act under section 2 (1) (b). Section 3 (i) defines 'on active service'. Over and above that, power is given to the Central Government under section 9, by notification, to declare any person or class of persons subject to the Act and who may be deemed to be 'on active service' within the meaning of the Act. The Government of India, Ministry of Defence, had issued the following notification on 28th November, 1952 :

"In exercise of the powers conferred by section 9 of the Army Act, (XLVI of 1950), the Central Government hereby declare that all persons subject to that Act, who are not on active service under clause (i) of section 3 thereof, shall, wherever they may be serving, be deemed to be on active service within the meaning of that Act for the purpose of the said Act and of any other law for the time being in force"

16. By virtue of this notification it follows that on the material date Punjab Regiment No. 24, to which the appellant was attached though it was at Nahan, which was a rest station, must be considered to have been 'on active service'. This notification was issued in the year 1962. Unfortunately, it was not brought to the notice of the learned Assistant Sessions Judge, notwithstanding the specific enquiry he made about the position of the accused. Section 70 of the Act runs as follows :

"A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a Court-martial, unless he commits any of the said offences—

(a) while on active service, or

(b) at any place outside India, or

17. As the appellant was alleged to have committed rape in relation to a person who was not subject to military, naval or air force law, under section 70, normally he could be tried by the ordinary criminal Court, but inasmuch as he was on active service at the time of the alleged offence, the Court-martial also gets jurisdiction to try the appellant. Therefore, this is a case where both the Court-martial and the ordinary criminal Court had concurrent jurisdiction to try the appellant. To meet such a situation suitable provisions have been made in sections 125, 126 of the Act and the Rules framed under section 549, Criminal Procedure Code. In *Major E. G. Barsay v. The State of Bombay*¹ the jurisdiction of the Special Judge to try an officer who was subject to the Army Act was questioned. No doubt the ultimate decision of the Court rested on a construction of the provisions of the Prevention of Corruption Act, 1947, and the jurisdiction of the Special Judge to try the military officer in that case was upheld. But in dealing with the contention raised on behalf of the appellant therein that the Special Judge had no jurisdiction to take cognizance of the offences with which the accused was charged and that he should have been tried only by a Court-martial under the Act, this Court had to consider the scheme of the Act.

18. After holding that the Act does not expressly bar the jurisdiction of the criminal Court in respect of the acts or omission punishable under the Act if they are also punishable under any other law in force in India, this Court held that sections 125, 126 and 127 excluded any inference about prohibition regarding jurisdiction of the criminal Courts and those sections in express terms provide not only for resolving conflict of jurisdiction between a criminal Court and a Court-martial in respect of the same offence, but also provide for successive trials of an accused in respect of the same offence. This Court has further laid down that sections 125 and 126 provide a satisfactory machinery to resolve the conflict of jurisdiction

1. (1969) 2 S.C.R. 177 : (1969) 1 S.C.J. 835 : (1969) M.L.J. (Cr.) 447 : A.I.R. 1969 S.C. 414.

1. (1962) 2 S.C.R. 195 : (1962) 1 S.C.J. 231 : (1962) M.L.J. (Cr.) 153.

having regard to the exigencies of the situation. The decision in our opinion, lays down that there is no exclusion of jurisdiction of the ordinary criminal Courts in respect of offences which are triable also by the Court martial.

19 In dealing with the Act, the Court in *Ram Sarup v The Union of India and another*¹ has observed that there could be a variety of circumstances which may influence the decision as to whether the offender is to be tried by the Court martial or by the ordinary criminal Court and the military officers, who are charged with the duty of exercising discretion are to be guided by the circumstances and the exigencies of the service maintenance of discipline in the army speedier trial nature of the offence and the person against whom the offence is committed.

20 In *Som Datt Datta v Union of India and others*², this Court has again elaborately considered the scheme of the Act as well as the Rules. Dealing with sections 125 and 126, at page 183 this Court observes

'Section 125 presupposes that in respect of an offence both a criminal Court as well as a Court martial have each concurrent jurisdiction. Such a situation can arise in the case of an act or omission punishable both under the Army Act as well as under any law in force in India. It may also arise in the case of an offence deemed to be an offence under the Army Act. Under the scheme of the two sections in the first instance it is left to the discretion of the officer mentioned in section 125 to decide before which Court the proceedings shall be instituted and, if the officer decides that they should be instituted before a Court martial the accused person is to be detained in military custody, but if a criminal Court is of opinion that the said offence shall be tried before itself it may issue the requisite notice under section 126 either to deliver over the offender to the nearest magistrate or to postpone the proceedings pending a reference to the Central Government. On receipt

of the said requisition, the officer may either deliver over the offender to the said Court or refer the question of proper Court for the determination of the Central Government whose order shall be final. These two sections of the Army Act provide a satisfactory machinery to resolve the conflict of jurisdiction having regard to the exigencies of the situation in any particular case."

21 A reference to the Act particularly to Chapter VI which comprises of sections 34 to 70 under the heading 'offences', the position that emerges according to the above decisions is that under Chapter VI there are three categories of offences, namely (1) offences committed by a person subject to the Act triable by a Court martial in respect whereof specific punishments have been assigned, (2) civil offences committed by the said person at any place in or beyond India but deemed to be offences committed under the Act and if charged under section 69 of the Act triable by a Court martial, and (3) offences of murder and culpable homicide not amounting to murder or rape committed by a person subject to the Act against a person not subject to the military law. Subject to a few exceptions they are not triable by Court martial but are triable only by ordinary criminal Courts. The said categorisation of offences and Tribunals necessarily bring about a conflict of jurisdiction. Where an offence is for the first time created by the Army Act, such as those created by sections 34, 35, 36, 37 etc., it would be exclusively triable by a Court martial but where a civil offence is also an offence under the Act or deemed to be an offence under the Act both an ordinary criminal Court as well as a Court martial would have jurisdiction to try the person committing the offence.

22 It is further clear that in respect of an offence which could be tried both by a criminal Court as well as a Court martial, sections 125, 126 and the Rules have made suitable provisions to avoid a conflict of jurisdiction between the ordinary criminal Courts and the Court martial. But it is to be noted that in the first instance discretion is left to the officer mentioned in section 125 to decide before which Court the proceedings should be instituted. Hence the officer command-

¹ (1964) 5 S.C.R. 931 (1964) 2 S.C.J. 619
(1964) M.L.J. (Cr.) 626
² (1969) 2 S.C.R. 177 (1969) 1 S.C.J. 835
(1969) M.L.J. (Cr.) 447 A.I.R. 1969 S.C. 414

ing the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed will have to exercise his discretion and decide under section 125 in which Court the proceedings shall be instituted. It is only when he so exercises his discretion and decides that the proceedings should be instituted before a Court-martial, that the provisions of section 126 (1) come into operation. If the designated officer does not exercise his discretion and decide that the proceedings should be instituted before a Court-martial, the Army Act would not obviously be in the way of a criminal Court exercising its ordinary jurisdiction in the manner provided by law.

23. We will presently show that in the case before us the designated officer in section 125 has not chosen to exercise his discretion and decided before which Court the proceedings should be instituted and in particular he has also not decided that the proceedings should be instituted before a Court-martial. When that is so, in our opinion, there was no occasion for the Criminal Court in this case to adopt the procedure laid down in section 126 of the Act. This view finds support from the second part of section 126 (1) which requires the criminal Court to issue a notice to the officer designated in section 125 of the Act to deliver over the offender to the nearest magistrate or to postpone the proceedings pending a reference to the Central Government. This is a clear indication that section 126 (1) presupposes that the designated officer has decided under section 125 that the proceedings shall be instituted before a Court-martial and has also directed that the accused person shall be detained in military custody.

24. As the facts on which we are basing our conclusion that there was no necessity for the criminal Court in question to adopt the procedure laid down in section 126 of the Act, will have also bearing on the construction of the relevant rules, it is desirable to refer to the relevant rules relied on by the appellant.

25. The rules have been framed by the Central Government under section 549 (1) Criminal Procedure Code. That section provides for the Central Government

making rules consistent with the Criminal Procedure Code and the Acts mentioned therein in respect of offences which could be tried by an ordinary criminal Court or by a Court-martial. It enjoins upon a magistrate when any person is brought before him, in respect of such an offence, to have due regard to the rules and to deliver him in proper cases to the appropriate officers mentioned therein, for being tried by a Court-martial. The material rules that are to be referred are rules 2, 3, 4, 5 and 8.

26. Rule 2 defines the expressions "commanding officer", "competent military authority", "competent naval authority" and "competent air force authority". Rules 3, 4, 5 and 8 are as follows :

Rule 3.—"Where a person subject to military, naval or air force law is brought before a magistrate and charged with an offence for which he is liable to be tried by a Court-martial, such magistrate shall not proceed to try such person * * * or to inquire with a view to his commitment for trial by the Court of Sessions or the High Court for any offence triable by such Court, unless

(a) he is of opinion, for reasons to be recorded, that he should so proceed without being moved thereto by competent military, naval or air force authority, or

(b) he is moved thereto by such authority.

Rule 4.—Before proceeding under clause (a) of rule 3, the magistrate shall give a written notice to the Commanding Officer of the accused and until the expiry of a period of—

"(i) three weeks, in the case of a notice given to a Commanding Officer in command of a unit or detachment located in any of the following areas of the hill districts of the State of Assam, that is to say—

- (1) Mizo,
- (2) Naga Hills,
- (3) Garo Hills,
- (4) Khasi and Jaintia Hills ; and
- (5) North Cachar Hills.

(ii) seven days, in the case of a notice given to any other Commanding Officer in command of a unit of detachment located elsewhere in India

from the date of the service of such notice, he shall not—

(a) convict or acquit the accused under sections 243, 245, 247 or 248 of the Code of Criminal Procedure (V of 1898), or hear him in his defence under section 244 of the said Code, or

(b) frame in writing a charge against the accused under section 254 of the said Code, or

(c) make an order committing the accused for trial by the High Court or the Court of Sessions under section 213 of the said Code or

(d) transfer the case for inquiry or trial under section 192 of the said Code

Rule 5—Where within the period of seven days mentioned in rule 4, or at any time thereafter before the Magistrate has done any act or made any order referred to in that rule the Commanding Officer of the accused or competent military naval or air force authority as the case may be gives notice to the magistrate that in the opinion of such authority, the accused should be tried by a Court martial the magistrate shall stay proceedings and if the accused is in his power or under his control shall deliver him with the statement prescribed in sub-section (1) of section 549 of the said Code to the authority specified in the said sub-section

Rule 8—Notwithstanding anything in the foregoing rules where it comes to the notice of a Magistrate that a person subject to military naval or air Force law has committed an offence, proceedings in respect of which ought to be instituted before him and that the presence of such person cannot be procured except through military naval or air force authorities the magistrate may by a written notice require the Commanding Officer of such person either to deliver such person to a magistrate to be named in the said notice for being proceeded against according to law, or to stay the proceedings against

such person before the Court martial if since instituted, and to make a reference to the Central Government for determination as to the Court before which proceedings should be instituted"

27 The main contention that has been urged by Mr Kohli, on behalf of the appellant is that in this case the Assistant Sessions Judge had no jurisdiction to proceed with the trial of the appellant as he has not complied with the provisions of rules 3 and 4. From a perusal of rules 3 and 4 the scheme of these two rules appears to us to be that the magistrate shall not proceed to try a military personnel unless he forms an opinion for reasons to be recorded to proceed with the trial without being moved by the competent authority or the magistrate has been so moved by the competent military authority, but before a magistrate decides to proceed with the trial without being moved by the competent authority he is obliged to give a written notice to the Commanding Officer of the accused and is further enjoined not to pass any of the orders enumerated as (a) to (d) in rule 4, till the expiry of the said period of the notice mentioned in clauses (1) and (2)

28 According to Mr Kohli the criminal Court has not been moved by the competent military authority to conduct the trial before it. The magistrate has not also framed an opinion that he should try the accused without being moved by the competent military authority. Even assuming that he has formed such an opinion he has not given the requisite notice and waited for the required period under rule 4. Hence it is argued that the criminal Court has acted illegally in proceeding with the trial of the appellant. We are not inclined to accept this contention of the learned Counsel.

29 Rule 4 is related to clause (a) of rule 3 and will be attracted only when the magistrate proceeds to conduct the trial without having been moved by the competent military authority. It is no doubt true that in this case the Assistant Sessions Judge has not given a written notice to the Commanding Officer as envisaged under rule 4. But, in our view that was unnecessary. When the competent military authorities knowing full well the nature of the offence alleged against the

appellant, had released him from military custody and handed him over to the civil authorities, the magistrate was justified in proceeding on the basis that the military authorities had decided that the appellant need not be tried by the Court-martial and that he could be tried by the ordinary criminal Court.

30. We will now refer in some detail to the particular circumstances in this case which will show that there has been no violation of the Act or the Rules. The High Court has pointed out that the District Inspector of Police, P.W. 12, has stated that after recording the statements of some of the witnesses he proceeded to the Cantonment area and contacted the officer commanding the Punjab Regiment No. 24. The said witness has also stated that with the permission of the said officer he interrogated the accused and examined his person. The Commanding Officer was not willing to hand over the accused till he obtained permission from the head-quarters. The Commanding Officer assisted P.W. 12 in carrying out the identification parade of the accused. The High Court has further stated that after having full knowledge of the charge against the appellant and the investigation that was being conducted by the police, the competent authority ultimately released the appellant from military custody and delivered him to the civil authorities for being tried according to law.

31. From these circumstances, in our opinion, it is legitimate to hold that the competent authority had handed over the appellant to the civil authorities for being tried after the former had considered the question of so handing him over after consultations with the headquarters. In these circumstances, it follows that the designated officer under section 125, who had the discretion in the first instance to decide that the appellant should be tried before a Court-martial had decided to the contrary. Surrender of the accused to the civil authorities to be dealt with by the latter, after being made aware of the nature of the offence against the appellant, is a clear indication that the decision of the military authorities was that the appellant need not be tried by a Court-martial and that his trial can take place before the criminal Court. Under these circumstances there was no occasion to follow the

procedure under section 126 or rule 4 as the military authorities had made abundantly clear that the appellant need not be tried by the Court-martial. That being so, it would have been altogether superfluous for the magistrate to give the notice as required by the said provisions. Rules 5 and 8 have no application to the facts of this case.

32. We agree with the High Court that there has been a substantial compliance with the relevant provisions of the Act and the Rules and hence the trial of the appellant and his conviction by the learned Assistant Sessions Judge are valid and legal.

33. In the result, the appeal fails and is dismissed.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA. (Criminal Appellate Jurisdiction.)

PRESENT :—*S. M. Sikri, V. Bhargava and I. D. Dua, JJ.*

Jadunath Singh and another

... *Appellants**

v.

State of Uttar Pradesh ... *Respondent.*

Evidence Act (I of 1872), section 9—Failure to hold test identification—Effect

The absence of test identification in all cases is not fatal and if the accused person is well known by sight it would be waste of time to put him up for identification. Of course, if the prosecution fails to hold an identification on the plea that the witnesses already knew the accused well and it transpires in the course of the trial that the witnesses did not know the accused previously, the prosecution would run the risk of losing its case. If there is any doubt in the matter the prosecution should hold an identification parade especially if an accused says that the alleged eye-witnesses did not know him previously. It may be that there is no express provision in the Criminal Procedure Code, enabling an accused to insist on an identifi-

* CrI. App. No. 55 of 1970.

cation parade but if the accused does make an application and that application is turned down and it transpires during the trial that the witnesses did not know the accused previously, the prosecution will, unless there is some other evidence run the risk of losing the case on this point Case law discussed [Para 18]

Appeal by Special Leave from the Judgment and Order dated the 26th September, 1969 of the Allahabad High Court in Criminal Appeal No 1037 of 1969 and Case Referred No 82 of 1969

Yogeshwar Prasad, S K Bagga and Mrs Shureshta Bagga Advocates for Appellants.

O P Rana Advocate, for Respondent

The Judgment of the Court was delivered by

Sikri, J—This appeal by Special Leave is directed against the judgment of the High Court of Judicature at Allahabad confirming conviction of the two appellants by the Sessions Judge, Man puri under section 302/34 of the Indian Penal Code. Appellant Jadunath Singh was sentenced to death by the Sessions Judge and appellant Girand Singh was sentenced to undergo imprisonment for life

2 In order to appreciate the points raised before us by the learned Counsel for the appellant it is necessary to state a few facts. It is alleged against the appellants that on 26th February 1968, at about 7-30 A.M., in furtherance of their common intention they murdered one Ram Swarup Pandey by repeatedly stabbing him to death when he was passing in the Grand Trunk Road in the town of Bewar to catch a truck. As many as 34 injuries were found on the deceased at the post mortem conducted on his body on the same day at about 3 P.M.

3 The prosecution case in brief is as follows. It is common ground that there was great enmity between the deceased and Laturi Ahir and his sons the two appellants. The deceased apprehended danger to his life from them and on 23rd November 1967 he sent an application to the Superintendent of Police Manpurī alleging that Laturi and his son Jadunath Brahma Panna Lal and Anokhey, etc., were terrorising the weaker and poorer

sections of the village community and declaring openly that they would kill the deceased to silence his opposition for ever. He prayed that an enquiry may be made and suitable action taken against them. On 25th February, 1968, the deceased came to Bewar in the evening to meet the A.D.O., in connection with an enquiry on a complaint made against Munshi Lal Pradhan of the village. He could not meet the A.D.O., as he was out of station. He stayed during the night with Prem Narain, P.W. 1, who happened to be a brother in law of his cousin Gulati Ram. According to Prem Narain, both of them got up in the morning at 6-45 A.M., and since it was *Shivratri* that day the deceased did not take any food and they left for the bus stand at Bewar. When they reached the bus stand at about 7-10 A.M., they found that the bus for Etah via Sultangarj had already left. The next bus was due to go at 9-30 A.M., but as the deceased thought that he could get a seat in some truck near the Prem Hotel and the Octroi barrier, they left the bus stand for the Octroi barrier. When they reached the house of Kotwal Singh on the way both the accused attacked the deceased with *chhuri* and knife respectively. Jadunath had the *chhuri* and Girand Singh had the knife. Both the deceased and Prem Narain were unarmed. On hearing the cries of the deceased Prem Narain asked the appellants why they were attacking the deceased. Then Girand Singh appellant advanced towards him and gave a knife cut at his right wrist. On the deceased falling down both accused persons attacked him with their respective weapons. On his raising the alarm Mahesh Chandra and Dwarka Prasad who were coming along the same road came and they shouted at the appellants. On hearing their shouts the accused ran away. The deceased died on the spot.

4 The First Information Report was lodged at 8 A.M. the Police Station being only two furlongs from the scene of occurrence. In the First Information Report in the second column under the heading "Name and residence of accused," it was stated as follows

1 Jadu Nath Singh father's name not known, and

2. Girand Singh father's name not known.

Ahirs by caste, residents of Garhia, Kishunpur P. S. Bewar Distt., Manipuri."

The accused surrendered on 12th March, 1968, and it appears that an application was filed by the advocate on their behalf that they be kept *ba pardah* as they might claim identification. Another application was put in on 25th March, 1968, in which it was stated that the witnesses other than Prem Narain were strangers and they applied that there should be an identification parade. On 19th April, 1968, the then Public Prosecutor submitted a report to the Additional District Magistrate as under :

"Accused Jadu Nath Singh and Girand Singh in case Crime No. 24 under section 302, Indian Penal Code, P. S. Bewar, have applied for identification, *vide* application herewith attached. It may be submitted that they are named in the F.I.R. and charge-sheet against them has also been received. The applications are moved to delay this case Submitted for n a."

The Additional District Magistrate (Judicial) passed the following order on the application, on 20th April, 1968 :

"As charge-sheet has already been received and the accused have been named by P.Ws., there appears to be no justification for ordering test identification. Accused be informed accordingly. The jail authorities be informed not to keep them *ba parda*."

5. We have set out these facts in detail because, as will presently appear, one of the points raised by the learned Counsel is that failure to put up the accused for identification either vitiated the trial or, in any case, rendered the evidence of P.W. 2, Mahesh Chandra, and P.W. 3, Dwarka Prasad, useless.

6. We may here notice that portion of the evidence of Dr. N. K. Mital, who conducted the post-mortem examination and on which one other point is sought to be founded. He found that the stomach was empty and the small intestines were half full and the large intestines were also half full. In cross-examination he stated that "since the stomach was empty, the deceased should have taken his last meal

about 4 to 6 hours before the infliction of the injuries." He was asked : "The evidence is that the deceased took puris and vegetable at 8 P.M. on 25th August, 1968, and according to the case for the prosecution his murder took place at 7-30 A.M., on 26th February, 1968. At the time of post-mortem the stomach was found empty and both the small and large intestines were found half full. Does it not indicate that in all likelihood the man was murdered between 3 and 4 A.M.?"

To this question Dr. Mital answered :

"No. It is not an indication of this fact. After finishing his meal at about 8 or 8-30 P.M., on 25th February, 1968, the stomach could have got empty by 2 or 2-30 A.M. The digested food material should have come in the small intestine by about 2 or 2-30 A.M. Complete digestion takes place in the small intestine..... And if he had answered the call of nature the preceding evening fully and completely, even then the small and large intestines might be half full and stomach empty if he had taken puries with vegetable at 8 P.M., on 25th February, 1968."

7. The learned Sessions Judge believed the evidence of Prem Narain, corroborated as it was by the injuries sustained by him in the course of the occurrence at the hands of one of the assailants, namely, Girand Singh. He also believed the evidence of Mahesh Chandra, P.W. 2, and Dwarka Prasad, P.W. 3. He relied on the fact that the appellants had absconded immediately after the crime and had only appeared before the Court as late as 12th March, 1968, after proceedings under sections 87 and 88 of the Code of Criminal Procedure, had been taken against them. Regarding the claim of the appellants for identification the learned Sessions Judge observed that during the course of investigation both Mahesh Chandra and Dwarka Prasad had named the accused persons, and it would indeed have been surprising if the Additional District Magistrate (Judicial) had directed the accused to be paraded at a test identification parade in the jail. He observed that the evidence indicated that the accused persons were not strangers even to Mahesh Chandra and Dwarka Prasad at the time of the occurrence. Mahesh Chandra had stated in his evidence that he had known the

accused persons for about 4 years and that they were living at village Garhiwa lying at a distance of three furlongs from Bewar, and that Girand Singh was reading at the Amar Shaheed Inter College, Bewar. Dwarka Prasad had stated that he had seen Girand visiting Bewar before that day. He had also seen Jadu Nath Singh at Bewar but only once or twice before that. For all these reasons the learned Sessions Judge held that the applications claiming identification were not *bona fide* and were intended to protract the proceedings and accordingly he was unable to draw any adverse inference against the prosecution for the omission to parade the accused persons at a test identification parade in the jail.

8 The High Court believed the three eye witnesses Prem Narain Mahesh Chandra and Dwarka Prasad. The High Court held that

Mahesh Chandra and Dwarka Prasad are wholly independent witnesses having no affinity with the deceased and entertaining no animosity towards the appellants.

The High Court observed that these witnesses had claimed to have known the appellants for the last six or seven years as they had been frequently visiting the town of Bewar and the appellant Girand Singh was a student in a college at Bewar.

9 The learned Counsel for the appellants raised two principal points before us—

(1) Since the accused were denied identification the trial was vitiated;

(2) The medical evidence is in conflict with the prosecution case about the time of the assault.

10 The learned Counsel further urged that the number and nature of injuries belie the prosecution story and the application by the deceased to the Superintendent of Police was nothing but a *pesh bandhi*. He urged that the eye witnesses were not reliable and the Courts below had missed the point that the appellants could not have anticipated that the deceased would be at this particular spot at that time.

11 The learned Counsel relied on the following observations of the Lahore High Court in *Sajjan Singh v Emperor*¹

“If an accused person is already well known to the witnesses an identification parade would of course, be only a waste of time. If, however, the witnesses claim to have known the accused previously, while the accused himself denies this it is difficult to see how the claim made by the witnesses can be used as a reason for refusing to allow their claim to be put to the only practical test. Even if the denial of the accused is false, no harm is done, and the value of the evidence given by the witnesses may be increased. It is true that it is by no means uncommon for persons who have been absconding for a long time to claim an identification parade in the hope that their appearance may have changed sufficiently for them to escape recognition. Even so, this is not in itself a good ground for refusing to allow any sort of test to be carried out. It may be that the witnesses may not be able to identify a person whom they knew by sight owing to some change of appearance or even to weakness of memory but this is only one of the facts along with many others such as the length of time that has elapsed, which will have to be taken into consideration in determining whether the witnesses are telling the truth or not.”

12 *State of Uttar Pradesh v Jagnoo*,¹ refers to *Scjjan Singh v Emperor*,² with approval.

13 In *Re Sargiah*,³ the decision of the Lahore High Court in *Sajjan Singh v Emperor*² was dissented from. Raja Mannar, J. observed

I am unable to find any provision in the Code which entitles an accused to demand that an identification parade should be held at or before the enquiry or the trial. An identification parade belongs to the stage of investigation by the police. The question whether a witness has or has not identified the accused during the investigation is not one which is in itself relevant at the trial. The actual evidence regarding identification is that which is given by the witness in Court. The fact that a particular witness has been able to

1 A.I.R. 1968 All 333

2 A.I.R. 1945 Lah 48 50

3 I.L.R. (1948) Mad 667 (1947) 2 M.L.J. 252 A.I.R. 1948 Mad 113

identify the accused at an identification parade is only a circumstance corroborative of the identification in Court. If a witness has not identified the accused at a parade or otherwise during the investigation the fact may be relied on by the accused, but I find nothing in the provisions of the Code which confers a right on the accused to demand that the investigation should be conducted in a particular way."

14. In *Parkash Chand Sogani v. The State of Rajasthan*¹, (an unreported decision of this Court) in connection with the point regarding identification, it was observed :

"Much is sought to be made out of the fact that no identification parade was held at the earliest opportunity in order to find out whether P.W. 7 Shiv Lal could have identified the appellant as the person who was at the wheel of the car and drove it and reliance is placed upon *Awadh Singh and others v. The Patna State*², *Provesh Kumar Bose and another v. The King*³, and also Phipson on the Law of Evidence, 9th Ed., p. 415 to justify the contention that in criminal cases it is not sufficient to identify the prisoner in the dock but the police should have held an identification parade at the earliest possible opportunity to show that the accused person had been connected with the crime. It is also the defence case that Shiv Lal did not know the appellant. But on a reading of the evidence of P.W. 7 it seems to us clear that Shiv Lal knew the appellant by sight. Though he made a mistake about his name by referring to him as Kailash Chandra, it was within the knowledge of Shiv Lal that the appellant was a brother of Manak Chand and he identified him as such. These circumstances are quite enough to show that the absence of the identification parade would not vitiate the evidence. A person, who is well known by sight as the brother of Manak Chand, even before the commission of the occurrence, need not be put before an identification parade in order to be marked out.

We do not think that there is any justification for the contention that the absence of the identification parade or a mistake made as to his name, would be necessarily fatal to the prosecution case in the circumstances."

15. In *Awadh Singh v. The State*¹ it was held that

"the accused person may or may not have legal right to claim for test identification and the holding of test identification may or may not be a rule of law, but it is a rule of prudence. Test identification parade should be held especially when the accused persons definitely assert that they were unknown to the prosecution witnesses either by name or by face and they requested the authorities concerned to have the test identification parade held."

16. In *Provesh Kumar Bose v. The King*², a Division Bench of the Calcutta High Court (Harries, C.J., and Das Gupta, J.) held :

"The fact that the witnesses have identified in Court the accused is of very little consequence in a prosecution under section 284, Penal Code, when none of the witnesses knew the accused from before the corroborative evidence which one is entitled to expect in cases of this nature is the evidence of the witnesses having pointed the accused whom they identified in Court from the midst of other persons with whom they were mixed up at a test identification parade. The evidence of their having identified such persons at a test identification parade has no substantive value, but is very important corroboration of their evidence in Court."

17. In *Kanta Prasad v. Delhi Administration*³ a point was made regarding non-holding of test identification parade by the police and this Court observed :

"As for the test identification parade, it is true that no test identification parade was held. The appellants were known to the police officials who had deposed against the appellants and the only persons who did not know them before were the persons who gave evidence of

1. CrI. Appl. No. 92 of 1956, decided on 15th January, 1957.

2. A.I.R. 1954 Pat. 483.

3. A.I.R. 1951 Cal. 475.

1. A.I.R. 1954 Pat. 483.

2. A.I.R. 1951 Cal. 475.

3. (1958) S.C.R. 1218, 1221 : (1958) S.C.J. 668; (1958) 2 An.W.R. (S.C.) 113; (1958) 2 M.L.J. (S.C.) 113; (1958) M.L.J. (CrI.) 508.

association, to which the High Court did not attach much importance. It would no doubt have been prudent to hold a test identification parade with respect to witnesses who did not know the accused before the occurrence but failure to hold such a parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification would be a matter for the Courts of fact and it is not for this Court to reassess the evidence unless exceptional grounds were established necessitating such a course."

18 It seems to us that it has been clearly laid down by this Court in *Parkash Chand Sogan v The State of Rajasthan*¹ that the absence of test identification in all cases is not fatal and if the accused person is well known by sight it would be waste of time to put him up for identification. Of course if the prosecution fails to hold an identification on the plea that the witnesses already knew the accused well and it transpires in the course of the trial that the witnesses did not know the accused previously, the prosecution would run the risk of losing its case. It seems to us that if there is any doubt in the matter the prosecution should hold an identification parade specially if an accused says that the alleged eye witnesses did not know him previously. It may be that there is no express provision in the Code of Criminal Procedure, enabling an accused to insist on an identification parade but if the accused does make an application and that application is turned down and it transpires during the course of the trial that the witnesses did not know the accused previously as pointed out above the prosecution will unless there is some other evidence, run the risk of losing the case on this point.

19 In the present case however, it is clear that P W Mahesh Chandra knew the accused persons for about four years for he said

"I know the accused persons, Jadunath Singh and Girand Singh for about 4 years. They live at village Garhiya lying at a distance of three furlongs from Bewar. Girand Singh is reading at the Amar Shaheed Inter College Bewar.

No cross examination was directed on this point. P W 3, Dwarika Prasad, stated

"I had seen Girand visiting Bewar before that but I had seen Jadunath at Bewar only once or twice before that day. Identifies both the accused persons in the dock. Lays hand correctly on Jadunath, and also lays hands correctly on Girand in the dock."

In cross examination he stated

I had seen Jadunath accused at Bewar at the shop of one Chhakku once or twice before the occurrence. I had seen him two or 2 1/2 years back."

20 It seems to us that the reason given by the Public Prosecutor in the report and the reason given by the Additional District Magistrate (Judicial) in the order directing that identification requested for be not held were not valid. The fact that a charge sheet had been received and the accused had been named by P Ws was no justification for not having ordered the test identification. But on the facts of this case it is clear that P W 2 at least knew the accused from before. As regards P W 3 although he claims to have known the accused, it is clear that his knowledge of the accused was very scant and if it had not been for the evidence of P W 2 we would not have placed reliance on the evidence of P W 3 in view of the fact that the police did not ask him to identify the appellant.

21 It is stated in Phipson on the Law of Evidence 9th Edition, page 415, as follows

"In criminal cases it is improper to identify the accused only when in the dock, the police should place him, beforehand, with others, and ask the witness to pick him out. Nor should the witness be guided in any way, nor asked 'Is that the man?'

We consider that the same is the law in India if the identity is in doubt.

22 Accordingly on the facts of this case we are of the opinion that the trial was not vitiated because the accused persons were denied identification.

23 Regarding the second point, we have already extracted the evidence of the doctor and it is quite clear to us that the evidence

¹ 1 Crd App'l No 92 of 1956 decided on 15th January 1957

is not in conflict with the prosecution case: If the occurrence took place at about 7-30 A.M. and the deceased had not taken any food in the morning, his stomach would still be empty at 7-30 A.M. If anything the medical evidence destroys the case of the defence that the murder took place at about 3 in the morning. We are unable to think that the deceased would leave with Prem Narain at 3 A.M. to catch a bus which was supposed to leave at about 7 A.M.

24. This appeal is by Special Leave and this Court does not re-appreciate the evidence. The other points raised by the learned Counsel are of that nature, and at any rate there is no substance in those points.

25. The appeal accordingly fails and is dismissed.

V.K.

*Appeal
dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*J. M. Shelat and C. A. Vaidialingam, JJ.*

State of Punjab

*Appellant **

v.

Kishan Dass

Respondent.

Constitution of India (1950), Article 311 (2) —“Reduction in rank”—Meaning of—Order forfeiting approved service and reducing the salary to the starting point in the time-scale of the same post—Such order also affecting seniority and chances of promotion—If amounts to “reduction in rank.”

The expression “reduction in rank” in Article 311 (2) has to be construed according to the well-established meaning it has acquired as in the case of the other two expressions, namely, ‘dismissal’ and ‘removal’ in that article, under the various Service Rules and the provisions in that regard in the Constitution Acts of 1915 and 1935. The word “reduction in rank” in that article therefore means reduction from a higher to a lower rank or

post and not merely losing places in the rank or cadre to which the Government servant belongs, and consequently, his seniority within such cadre or rank. This would be so, even if as a result of the Government’s action he loses a higher salary or his chances of promotion to a higher post are reduced. For such action, the remedy would be under the service rules and not under Article 311 (2).

Therefore, an order forfeiting the past service which has earned a Government servant increments in the post or rank he holds, howsoever adverse it is to him, affecting his salary, seniority within the rank to which he belongs or his future chances of promotion, does not attract the article. His remedy is confined to the rules of service governing his post.

[*Paras. 9 and 13.*]

Rupnarain Singh v. State of Orissa, A.I.R. 1959 Orissa 167, Overruled. [Para. 13.]

Appeal by Special Leave from the Judgment and Order, dated the 29th July, 1966 of the Punjab High Court in Civil Misc. No. 1144-C of 1966 in Regular Second Appeal No. 340 of 1966.

V. C. Mahajan, Advocate, for Appellant.

A. K. Nag, Advocate, for Respondent.

The Judgment of the Court was delivered by

Shelat, J.—The respondent was at all material times a constable in the Punjab Police Service and was posted at Ambala. In November, 1960, he was served with a charge-sheet attributing to him arrogance towards his superior officers and indiscipline. A departmental enquiry was admittedly held in accordance with the procedure laid down therefor in the Punjab Police Rules, 1934. The said charges having been held to have been proved, an order followed forfeiting his entire service with permanent effect. This meant bringing down his salary to Rs. 45 per month, which would be the salary payable to a constable at the starting point of his service. An appeal by him before the Deputy Inspector-General having failed, he filed a suit in the Court of Sub-Judge, Ambala.

2. The suit was on the basis that the said order amounted to reduction in rank, the

*C.A. No. 359 of 1967.

therefore, Article 311 (2) of the Constitution was attracted and that no show cause notice against the action proposed against him having been served upon him before the said order was passed, the order was vitiated and was bad. The trial Court accepted this contention and decreed the suit. An appeal by the appellant State failed as the District Judge relying on *Rupnaram Singh v State of Orissa*¹, held that the said order amounted to reduction in rank and the respondent was therefore entitled to the procedural safeguards laid down in Article 311 (1). A second appeal by the State before the High Court was summarily rejected. Hence this appeal founded on Special Leave granted by this Court.

3 The only question arising in this appeal, the facts not being in dispute, is whether the order forfeiting the respondent's service which meant reducing his salary to the starting point in the time scale for constables, amounted to reduction in rank within the meaning of Article 311 (2). The respondent being a constable, there was no question of his being reduced from a higher post or rank to a lower post or rank. The order, nonetheless reduced the emoluments received by him as it deprived him of the increments earned by him as a result of the approved service he had put in, having been forfeited. It also affected his seniority, and therefore chances of promotion. The question is, whether for that reason the order is tantamount to reduction in rank attracting Article 311 (2).

4 Rule 13 of the Punjab Police Service Rules (hereinafter referred to as the Rules) provides that a "gazetted police officer" means a police officer appointed under section 4 of Article V of 1861, and includes the Inspector General, Deputy Inspectors General, Assistant Inspectors General, Superintendents, Assistant Superintendents and Deputy Superintendents. The expression "enrolled police officer" means police officers appointed under section 7 of the said Act and includes Inspectors, Sergeants, Sub-Inspectors, assistant Sub-Inspectors, Head Constables and Constables. The expression "upper subordinate" includes all enrolled police officers of and above the rank of assistant

Sub-Inspector, and the expression "lower subordinate" includes all other enrolled police officers. There is thus a hierarchy in the Police Service of the State comprised of several posts, the post of a constable being the last rung in the ladder. Rule 13.1 which deals with promotion of police officers from one rank to another, provides that such promotions from one rank to another and from one grade to another in the same rank shall be made by selection tempered by seniority. Clause 3 of that rule lays down that for purposes of regulating promotion amongst enrolled police officers, six promotion lists A, B, C, D, E and F should be maintained, Lists A, B, C and D are meant to regulate promotion to the selection grade of constables and to the ranks of Head Constables and Assistant Sub-Inspectors. List E regulates promotion to the rank of Sub-Inspector and List F regulates promotion to the rank of Inspector. Rule 13.5 deals with promotion of constables to selection grade and Rule 13.6 provides that a list, called List A, shall be maintained by each Superintendent of Police of constables eligible under Rule 13.5 for promotion to the selection grade of constables. Rule 13.7 provides for a list, called List B, divided into two parts, namely selection grade constables considered suitable as candidates for the Lower School course at the Police Training School and constables, selection or time-scale, considered suitable for drill and other special courses at the Police Training School. Rule 13.8 lays down that promotion to the post of head constable has to be made in accordance with the principle described in sub-rules (1) and (2) of rule 13.1. Rule 13.8 A provides that infliction of any major punishment would be a bar to admission to or retention in list A, B or C. Rule 16.1 lays down diverse punishments which can be awarded to members of the service in accordance with the provisions contained in these rules. These punishments are (1) dismissal (2) reduction, (3) stoppage of increment or forfeiture of approved service for increment, (4) entry of censure (5) confinement to quarters for a period not exceeding 15 days, (6) extra guards fatigue or other duty, and punishment drill for certain days. Under Rule 16.1 (3), a major punishment means any authorized punishment of reduction, withholding of

increments, forfeiture of approved service, dismissal and every judicial conviction on a criminal charge. Rule 16.4 defines 'reduction' and provides that a police officer may be reduced : (a) to a lower rank (except in the case of sergeants and of constables on the time-scale), (b) from the selection grade of a rank to the time-scale of the same rank, (c) if in a graded rank to a lower position in the seniority list of his grade or to a lower grade in his rank. Rule 16.5 provides that the increment of a police officer on a time-scale may be withheld as a punishment. Clause (2) of that rule provides that approved service for increment may be forfeited, either temporarily or permanently, and such forfeiture may entail either the deferment of an increment or a reduction in pay. It further provides that the order must state whether the forfeiture of approved service is to be permanent, or, if not, the period for which it has been forfeited. Thus, under Rules 16.4 and 16.5 the two punishments of reduction and forfeiture of service are two distinct punishments. Rule 16.24 lays down the procedure to be followed in departmental enquiries. Clause (ix) of that rule clearly provides that it is only in the case of an order of dismissal or reduction in rank that a second show cause notice against the proposed action against a police officer has to be served before an order is passed against him. Such a second show cause notice is, therefore, not required to be served in the case of other major or minor punishments. There is no dispute that in the present case the procedure laid down in these rules and applicable to the respondent was followed.

5. The contention, however, was that though the Rules distinguish the two punishments of reduction and forfeiture of service and treat them as distinct, there were certain decisions of this Court which have held that for an order to amount to reduction in rank within the meaning of Article 311 (2) it was not necessary that it must actually reduce a Government servant from a higher to a lower post or rank, and that even if the order affected adversely his seniority or chances of promotion within the rank or cadre to which he belongs, it would still constitute reduction in rank.

6. *Parshottam Lal Dhingra v. Union of India*¹, was one such case on which counsel leaned heavily. But the question there was whether the reversion of the appellant from Class II service, wherein he was at the relevant time officiating to Class III service to which he permanently belonged, amounted to punishment, and therefore, attracted Article 311 (2). The decision laid down the principle that reduction in rank; would be punishment if it carried with it penal consequences and that the two tests to be applied were: (1) whether the servant had the right to the post or rank, and (2) whether evil consequences, such as forfeiture of pay or allowances, loss of seniority in his substantive rank, stoppage or postponement of future chances of promotion followed as a result of reduction in rank. The appellant in that case was holding an officiating post and had therefore no right under the Railway Code to continue in it. The Court held that since under the general law such appointment was terminable at any time on reasonable notice, the reduction could not operate as a forfeiture of any right, and therefore, the order could not be said to have visited him with any evil consequences. Consequently, it did not amount to reduction in rank by way of punishment. The decision also laid down that the words "dismissal", "removal" and "reduction in rank" used in Article 311 (2) were words of art, having technical meanings, they having been adopted from service rules prevailing earlier, such as Classification Rules of 1920 and 1930, and having therefore acquired well-known meanings. Under those rules, dismissal, removal and reduction in rank were major punishments providing special procedural protection. On examination of the history of the Service Rules, section 96-B (2) of the Government of India Act, 1916, and section 240 of the 1935 Act, the Court held that "both at the date of the commencement of the 1935 Act and of our Constitution the words, "dismissed", "removed" and "reduced in rank", as used in the Service Rules, were well understood as signifying or denoting the three major punishments which could be inflicted on Government servants. The decision concluded that "the principle is

1. (1958) S.C.R. 828 : (1958) S.C.J. 217.

that when a servant has right to a post or to a rank either under the terms of the contract of employment, express or implied, or under the rules governing the conditions of his service, the termination of the service of such a servant or the reduction to a lower post is by itself and *prima facie* a punishment, for it operates as a forfeiture of his right to hold that post or that rank and to get the emoluments and other benefits attached thereto'. The passage in the judgment emphasised before us was

"A reduction in rank likewise may be by way of punishment or it may be an innocuous thing. If the Government servant has a right to a particular rank, then the very reduction from that rank will operate as a penalty for he will then lose the emoluments and privileges of that rank. If, however he has no right to the particular rank, his reduction from an officiating higher rank to his substantive lower rank will not ordinarily be a punishment. But the mere fact, that the servant has no title to the post or the rank and the Government has by contract, express or implied or under the rules, the right to reduce him to a lower post does not mean that an order of reduction of a servant to a lower post or rank cannot in any circumstances be a punishment. The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences"

According to this decision reduction in rank within the meaning of Article 311 (2) means reduction from a higher to a lower rank or post in the hierarchy of the service to which a Government servant seeking protection of that Article belongs and not reduction in the same rank, e.g. losing places in seniority in the rank to which he belongs

7. *Shri Madhav Laxman Vaikunthe v The State of Mysore*¹, another decision relied on by Counsel was a case of a Mamlatdar, officiating as a District Deputy Collector. His reversion from the officiating post to his permanent post was held to be punishment attracting

Article 311 (2). This was a clear case of reduction in rank as the reversion brought down the appellant from a higher to a lower post. It did not merely affect his seniority or the stage at which he was in the time scale to which he belonged in the hierarchy of service

8. The decision in point really is *The High Court, Calcutta v Amal Kumar Roy*,² where the respondent, a Munsif, was excluded by the High Court from consideration for the post of a Subordinate Judge for a year thereby depriving him eight places in the cadre of Subordinate Judges when he was appointed an Additional Subordinate Judge. The respondent's contention was that such an exclusion amounted to withholding of promotion or reduction in rank. The first part of the contention was rejected on the ground that he had no right to promotion and the second on the ground that deprivation of eight places in seniority in the same rank did not constitute reduction in rank. This decision was followed in *Shri S. Srivastava v North Eastern Railway*,³ where it was held that the removal of the appellant's name from a provisional panel of persons for consideration for higher posts did not attract Article 311 (2) as it did not amount to reduction in rank. The Court held that the expression "rank" in Article 311 (2) had reference to a person's classification and not his particular place in the same cadre in the hierarchy of the service to which he belongs

9. It is thus clear that reduction in rank within the meaning of Article 311 (2) as the expression itself suggests means reduction from a higher to a lower rank or post and not merely losing places in the rank or cadre to which the Government servant belongs and consequently his seniority within such cadre or rank. This would be so, even if as a result of the Government's action he loses a higher salary or his chances of promotion to higher post are reduced. For such action the remedy would be under the rule governing the service and not under Article 311 (2) as such action does not amount to reduction in rank as understood for the purposes of Article 311 (2)

10. Counsel for the respondent, however, argued that there were other decisions which have held otherwise and assisted him. *P. C. Wadhwa v. Union of India*¹, was one such decision which, he thought, assisted him. In that case, the appellant was officiating in the senior time-scale and was posted at Ferozepore as an Additional Superintendent of Police. In July, 1958, he was reverted to his substantive post. The reason for the reversion was that he was tried as a Superintendent of Police and was found to be immature. The record showed that the reversion was not due to the return of the permanent incumbent from leave or deputation or for any other administrative reason and other officers junior to him continued in the senior time-scale while he was reverted. The record also revealed that an enquiry was not resorted to only for the reason that it would take a long time. His contention in these circumstances was that his reversion amounted to reduction in rank. That was accepted because it would seem from the facts that the reversion was from senior time-scale to junior time-scale of the service. Though both the posts were cadre posts in the Police Service, the reversion was from the post of the Additional Superintendent of Police to one of Assistant Superintendent of Police, the former obviously being a post higher than the latter. Although both the posts were in the same cadre, promotion from the junior to the senior time-scale was by seniority. It is clear, therefore, that appointment of one in the junior time-scale to a post in the senior time-scale was promotion, and therefore, appointment to a higher post. Such is not, however, the position in the instant case.

11. *Dubesh Chandra Das v. Union of India*², was another decision relied upon by Mr. Nag. The appellant there was the Chief Secretary of Assam and a member of the Indian Civil Service. He was appointed as Secretary in the Union Government, a tenure post, the tenure period of which was to expire in July, 1969. In September, 1966, he was asked to choose between reversion to the service of his parent State or compulsory retire-

ment. He complained against the order by a writ petition contending that the order was a stigma and amounted to reduction in rank, which, therefore, could not be passed without undergoing the procedure laid down in Article 311 (2). His appointment as the Secretary at the Centre was not by way of deputation but was by way of appointment to a tenure post. This Court held, on an examination of the rules, that cadres for the Indian Administrative Services were to be found in the States only, that there were no cadres in the Government of India, that a few of them were, however, intended to serve at the Centre and when they did so, they enjoyed better emoluments and better status. Such an appointment, the Court held, meant promotion to a higher post. In the circumstances, the order amounted to the appellant's reduction from a higher to a lesser rank. This, again, was a case where the Government servant was reverted from a post higher than the post of the Chief Secretary, Assam, and not a reduction in the same time-scale post or deprivation of places in the same time-scale post thereby adversely affecting his seniority therein or chances of promotion.

12. The decision of the High Court of Orissa in *Rupnarain Singh v. State of Orissa*¹, would apparently assist the respondent, for the impugned order there was similar to the one in the instant case. That order directed that the petitioner, who was then serving as a forester, be reduced to the lowest scale of Rs 50 in the scale of pay of Rs. 50—2—70 fixed for the foresters. The High Court upheld the contentions of the petitioner, viz., (1) that the order was punishment, and (2) that it amounted to reduction in rank within the meaning of section 240 (3) of the 1935 Act and Article 311 (2). These conclusions were reached on two premises. The first was that rule 2 of the Bihar and Orissa Subordinate Services Discipline and Appeal Rules in clause (iii) provided, amongst others, the punishment of "reduction to a lower post or time scale or to a lower stage in the time-scale". Following the decision in *Afzalur Rahman v. Emperor*², where the Court had observed

1. (1964) 4 S.C.R. 598.

2. (1970) 1 S.C.J. 16; (1970) 1 S.C.R. 220; A.I.R. 1970 S.C. 77.

1. A.I.R. 1959 Orissa 167.

2. (1943) F.C.R. 7; (1943) F.L.J. 7; (1943) 2 M.L.J. 62; A.I.R. 1943 F.C. 18.

that in construing section 240 of the 1935 Act, the longstanding service practice based on statutory rules in force long before the passing of the 1935 Act, and which were continued in force by that Act should be considered, the High Court held that the expression "reduction in rank" in section 240 (3) must also include reduction to a lower stage in the time-scale as rule 2 (iii) had treated reduction to a lower post and "reduction to a lower stage in the time scale" as one kind of punishment. Such a reasoning does not apply to the present case because rule 161 of the Punjab Police Rules, makes a clear distinction between "reduction and stoppage of increment or forfeiture of approved service for increment, the two being distinct and separate punishments permissible under that rule. The second premise upon which the High Court reached the said conclusions rested on the observations in *Dhingra's case*¹, wherein this Court laid down the criterion to judge whether an order is a punishment or not by observing that it would be punishment if the order entailed or provided for forfeiture of pay or allowances or loss of seniority in his substantive rank or stoppage or postponement of his future chances of promotion. The passage relied on by the High Court laid down determination for treating an order as one of punishment and not a test for reduction in rank. As already stated in *Dhingra's case*¹ the impugned order was held to be one of reduction in rank because the appellant there was reduced from Class II to Class III service i.e., from a higher to a lower post the time scales of the two posts being different. The reduction of rank was held not to be a punishment because the appellant was not entitled to the better post wherein he was merely officiating and therefore did not visit him with any evil consequences. The observations relied on by the High Court thus related to the question whether the impugned order was one of punishment and not for deciding whether it amounted to a reduction in rank and were therefore, not apposite. The basis for the second premise of the High Court, therefore was not correct and therefore cannot help the respondent.

13 The aforesaid analysis of the decisions leads us to the conclusion that the expression "reduction in rank" in Article 311 (2) has to be construed according to the well established meaning it has acquired, as in the case of the other two expressions, namely, 'dismissal' and 'removal' in that Article under the various service rules and the provisions in that regard in the Constitution Acts of 1915 and 1935. The expression "reduction in rank" in the Article, therefore, means reduction from a higher to a lower rank or post when imposed as a penalty. Therefore, an order forfeiting the past service which has earned a Government servant increments in the post or rank he holds, howsoever adverse it is to him affecting his seniority within the rank to which he belongs or his future chances of promotion does not attract the Article. His remedy, therefore, is confined to the rules of service governing his post. In our view, neither *Parshotam Lal Dhingra's case*¹, nor *Rupnarain Singh's case*², assists the respondent, as the first does not lay down what he contended and the second was not correctly decided.

14 The result is that the State's appeal succeeds and must be allowed. Consequently, the respondent's suit has to be dismissed. In the circumstances of the case, however, there will be no order as to costs.

V.K.

Appeal allowed

4 (1958) S.C.R. 823 (1951) S.C. 217.

1 (1958) S.C.R. 823 (1958) S.C.J. 217
2. A.L.R. 1959 Orissa 167

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—*M. Hidayatullah, C.J., S.M. Sikri, G.K. Mitter, A.N. Ray and P. Jaganmohan Reddy, JJ.*

Prabhakar Yeshwant Joshi and others
*Petitioners**

v.

The State of Maharashtra and others
Respondents.

Civil services—Rules framed under the resolution of the Government of Bombay in the Public Works Department dated 29th April, 1960, rule 7—Maharashtra Service of Engineers—Promotion to the post of officiating Executive Engineers—7 years service required to entitle person in class II for promotion, if should be permanent service—Resolution of the Government dated 23rd February, 1967, directing employees from the erstwhile State of Hyderabad as having been appointed in the reorganised Bombay State as temporary Deputy Engineers with effect from 31st March, 1937 only for the purpose of fixation of their seniority in the grade of Deputy Engineers and for promotion to higher posts—Validity—Promotion on the basis of seniority-cum-merit—Rights of senior officers.

The petitioners challenged the orders of the State of Maharashtra promoting the respondents to the posts of officiating Executive Engineer in the Maharashtra service of engineers, ignoring their claims. The petitioners were directly recruited as Deputy Engineers. The respondents were formerly in the service of different States and were allotted to the State of Bombay under the States Reorganisation Act. The petitioners' case was that under the rules in force, the respondents who were in the substantive rank of overseers were only officiating Deputy Engineers and that as they did not belong to the cadre of Deputy Engineers they were not entitled to promotion inasmuch as they had to put in, after confirmation as Deputy Engineers, 7 years of actual service before being eligible for promotion. On the other hand, the petitioners were direct recruits and were entitled to promotion after 7 years of service from the

date of appointment. The petitioners further contended that in the case of employees from the erstwhile State of Hyderabad the Government, contrary to the rules relating to promotion, by a resolution dated 23rd February, 1967, directed them to be treated as having been appointed in the reorganised Bombay State as temporary Deputy Engineers with effect from 31st March, 1937 only for the purpose of fixation of their seniority in the grade of Deputy Engineers and for promotion to higher posts. By so directing the Government conferred, in an arbitrary manner, an advantage on the said respondents to the detriment of the petitioners.

Held, rejecting the contentions of the petitioners, (i) it could not be said that a promotee officiating Deputy Engineer Class II, was not entitled to be considered for promotion under rule 7 to the post of an officiating Executive Engineer unless he had put in 7 years of service from the date of confirmation. There was no impediment to a Deputy Engineer with 7 years' service, whether officiating, temporary or permanent, to entitle him for promotion as an Executive Engineer.

[Paras. 10, 12.]

(ii) The respondents who were from the ex-Hyderabad State were in fact selected by the Hyderabad Public Service Commission as Assistant Engineers and would have been appointed as such but for the States Reorganisation Act. Thus the claims of these respondents arose earlier than the appointments of the petitioners and the Government was entitled to consider these claims and to give redress. It was open to the Government to which they were allotted to take into consideration the fact that they would have been appointed in the erstwhile State from a particular date, to treat them as such and to equate their posts which they would have held. In these circumstances, there was no statutory bar or rule which prohibited the Government from deeming their appointment as from 31st March, 1937, for the limited purpose of seniority and promotion. [Paras. 13, 14.]

(iii) Apart from these there was another formidable obstacle in the way of the petitioners and it was that for promotion to the post of officiating Executive Engineers, they should be put on the

*W. Ps. Nos. 112 to 114 of 1968.
 29th September, 1969.

select list by a committee of the Chief Engineers. When promotions were made on the basis of seniority-cum merit, all that could be required is that persons entitled to promotion should be considered and if having been considered they have been left out, they would have no claim to promotion as a matter of right.

[Para 15]

Petition under Article 32 of the Constitution of India for enforcement of the Fundamental Rights

S V Gupte Senior Advocate (*M J Rana*, Advocate and *B.R. Agarwala* Advocate of *M/s Gagrati & Co.*, with him), for Petitioners

M C Chagla, Senior Advocate (*G L Sanghi* and *S P Nayar* Advocates, with him), for Respondent No. 1

S Mohan Kumaramangalam Senior Advocate (*Dr T S Chitle* *S N Prasad* and *R B Datar* Advocates, with him), for Respondents Nos. 2, 4, 6 to 23, 25, 27 to 30 and 32 to 34

Respondent No. 3 in person

The Judgment of the Court was delivered by

Jaganmohan Reddy, J—The three petitioners by these petitions under Article 32 of the Constitution have challenged the promotion by the first respondent who, ignoring the claims of the petitioners, have promoted respondents 2 to 5 and other persons similarly situated to the post of officiating Executive Engineers contrary to the principles of natural justice and in violation of Articles 14 and 16 of the Constitution. All the three petitioners were, directly recruited by the Public Service Commission as Deputy Engineers in the Bombay Service of Engineers Class II now known as Maharashtra Service of Engineers Class II. The first respondent is the State of Maharashtra. Respondent No. 2 belonged to the erstwhile State of Bombay. Respondents 3 and 4 belonged to the former State of Hyderabad, while respondent No. 5 to the former State of Madhya Pradesh, and were allocated to the State of Bombay under the States reorganisation. Likewise the other respondents who were formerly in the service of different States referred to above, now belong to the Maharashtra Service of Engineers.

2 The petitioners' case is that under the rules in force the respondents who were in the substantive rank of overseers were only officiating Deputy Engineers and that as they did not belong to the cadre of Deputy Engineers they were not entitled to promotion inasmuch as they had to put in after confirmation as Deputy Engineers 7 years of actual service before being eligible for promotion as officiating Executive Engineers. On the other hand the petitioners were direct recruits and were entitled to promotion after 7 years of service from the date of appointment, as their subsequent confirmation related back to that date. It is contended that the first respondent, contrary to these rules, appointed respondents 2 to 34 as officiating Executive Engineers before they had completed 7 years of actual service after the date of confirmation and particularly in the case of employees from the erstwhile State of Hyderabad it had, contrary to the rules relating to promotion, by a resolution dated the 23rd February, 1967, directed respondents 3, 4, 6 to 14 to be treated as having been appointed in the reorganised Bombay State as temporary Deputy Engineers with effect from 31st March, 1937, only for the purpose of fixation of their seniority in the grade of Deputy Engineers and for promotion to higher posts. By so directing, respondent No. 1 conferred, in an arbitrary manner, an advantage on the said respondents to the detriment of the petitioners while, as a matter of fact, those respondents had not completed either 7 years of actual service after confirmation as required by the rules nor did they have even 7 years' service as officiating Deputy Engineers on the date of promotion as officiating Executive Engineers.

3 In order to understand the contentions urged on behalf of the petitioners it will be necessary to state briefly the history of the service and the several resolutions which are applicable to them in respect of recruitment as well as seniority. The Bombay and subsequently the Maharashtra service of Engineers consists of Class I and Class II (Deputy Engineers). They were initially governed by rules framed under the resolutions of the Government in the Public Works Department dated the 22nd March, 1937. The recruitment to these services both in Class I and Class II was partly by direct recruit

ment and partly by promotion from amongst the members of the lower cadres. In 1939 further rules were made to regulate the method of recruitment to the State services. Under these rules recruitment to the Bombay Service of Engineers Class I was to be from two sources, (1) by nomination under rule 3 by virtue of the guarantee given to the Engineering College of Poona and (2) by promotion from the existing Bombay Service of Engineers (since discontinued) or from the Bombay Service of Engineers Class II. The recruitment to the Bombay Service of Engineers Class II under the rules of 1939 was also to be similarly from two sources, (1) by nomination under rule 11 in accordance with the guarantee to the Royal College of Poona (which was withdrawn in 1947), and (2) by promotion from (a) Bombay Subordinate Engineers Service, (b) permanent and temporary supervisors, and (c) temporary Engineers appointed on annual sanction. These rules however did not specify the principles upon which the seniority of the direct recruits and the promotee officers was to be determined. The Government of Bombay accordingly by a resolution dated 21st November, 1941 laid down the following principles to be applicable to direct recruits and promoted officers in the provincial service except the Bombay Service of Engineers Class I:

“(1) In the case of direct recruits appointed directly on probation, the seniority should be determined with reference to the date of their appointment on probation;

(2) In the case of officers promoted to substantive vacancies the seniority should be determined with reference to the date of their promotion to the substantive vacancies provided there has been no break in service prior to their confirmation in those vacancies.”

It may here be stated that the Bombay Government had appointed a committee known as Gurjar Committee to examine whether Class I and Class II cadres in the said services should be continued or whether they should be combined into one class and what should be the ratio between the direct recruits and the departmental promotees to the said service. The Committee made its recommendations

in 1951. The Government after due consideration of the recommendations and the earlier rules regulating the condition of service in the Bombay Service of Engineers passed a resolution dated 29th April, 1960, setting down the principles for recruitment to the Bombay Service of Engineers Class I and Class II. Before this resolution, as we have noticed earlier, the Deputy Engineers Class II service cadre consisted of (a) direct recruits to the Bombay Service of Engineers Class II (b) Deputy Engineers confirmed from the subordinate services of Engineers, (c) temporary Deputy Engineers recruited by the Bombay Public Service Commission, and (d) officiating Deputy Engineers and similar other categories. These four categories were being compiled into 2 lists only, namely, (1) Bombay Service of Engineers Class II cadre of permanent Deputy Engineers, and (2) the list of officiating Deputy Engineers. It also further continued the existing constitution of Class I and Class II Engineering Service. The appointments to be made were to be both by direct recruitment through the competitive examinations held by the Public Service Commission and by promotion, provided however that the ratio of appointments by nomination and by promotion shall as far as practicable be 75 : 25. The candidates appointed to either of the two services by nomination had to be on probation for 24 years before being confirmed provided further that an Assistant Engineer would be confirmed as Executive Engineer after nine years' service unless the period is extended by the Government. The Deputy Engineers Permanent in Class II cadre had to put in at least 15 years of service in Class II in temporary and permanent capacities and must be officiating Executive Engineers at the time of their absorption.

4. The resolution of 1960 provided that in future recruitment to Bombay Service of Engineers Class II cadre shall be made (1) by nomination of candidates recruited directly by a competitive examination held by the Commission, and (2) by promotion from the list of officiating Deputy Engineers. The direct recruitment of temporary Deputy Engineers was to cease and the officiating vacancies were to be filled from the ranks of subordinate service of Engineers for which purpose a

Statewise select seniority list of members of the subordinate service of Engineers cadre considered fit to hold sub-divisional charges was to be compiled and maintained as on 30th June, each year. On 29th July, 1963 the Government of Bombay further amended the rules prescribed in Government Resolution of 21st November, 1941 for regulating the seniority of direct recruits and promoted officers. In supersession of the previous rules it provided that the seniority of the direct recruits is to be determined according to the date of appointment on probation and of the promotees according to the date of promotion to officiate continuously irrespective of whether the appointments are made in temporary or in permanent vacancies subject to the provisions contained therein.

5 In so far as promotion from lower to higher grade of post is concerned, the principle of seniority-cum merit was always followed by the Government which subsequently also formed the basis of the Government resolution dated 18th December, 1950 which *inter alia* prescribed that no officer who had positive qualification should be passed over by an officer junior to him unless the latter had in addition really exceptional ability or qualification. This resolution was passed after consultation of the Bombay Public Service Commission and in supersession of the orders of the previous resolutions dated 22nd May 1944 23rd March 1945 and the 18th March 1947. Thereafter by another resolution dated 4th March, 1957 the principle for the preparation and maintenance of a select list of Deputy Engineers who were considered fit for promotion as Executive Engineers was formulated. According to this resolution, a committee consisting of 3 Chief Engineers under the Chairmanship of the senior Chief Engineer was to review in December each year the claim of officers in the Bombay Service of Engineers Class II for promotion to the post of Executive Engineer. This committee had to prepare a select list with due regard to the provisions of the Government resolution dated the 18th December, 1950. Likewise the Government by a resolution dated 20th August 1965 revising its previous resolution dated 24th August, 1954 and 14th December 1959, formulated the principles for preparation, maintenance

and revision of a list of overseers fit for promotion as Deputy Engineers. Under this resolution Statewise list as on 1st April of every year of each of the categories of overseers had to be made comprising of (1) graduate overseers, (2) diploma holder overseers (DCE—Poona) or equivalent, (3) subordinate overseers holding the diploma of the Osmania University, and (4) non-qualified overseers. The length of service required for eligibility to promotion to the post of officiating Deputy Engineer in respect of the first category was 3 years, second category 8 years, third category 10 years including past service as sub-overseers of those allocated from the ex Hyderabad State and fourth category 13 years.

6 We may now briefly state the different grades of service and the channels of promotion in the Engineering service of the Maharashtra State created as a consequence of the various rules. At the apex of the service are the Chief Engineers, Superintending Engineers and the Executive Engineers who constitute Class I service. The channels of promotion to the cadre of Executive Engineers is from two sources, (a) direct recruit to Class I—Assistant Engineers, and (2) Deputy Engineers Class II. The cadre of Deputy Engineers Class II is constituted by direct recruits 75 per cent and promotees 25 per cent. The channels of promotion to the promotees Class II were from temporary Engineers and from the subordinate service, namely, graduate engineers, now known as junior engineers, diploma holder overseers and junior or non technical overseers promoted from still lower ranks.

7 The case of the first respondent and the other respondents is that the 7 years' qualifying service required for promotion of Officiating Executive Engineers is continuous officiating service as Deputy Engineer and not as contended by the petitioners to be reckoned from the date of confirmation as Deputy Engineers. It is contended first, that the interpretation of rules 6, 7 and 8 of the 1960 resolution does not *ex facie* lend itself to the interpretation suggested by the petitioners; secondly, that it ignores the subsequent amendment effected by the 1963 Resolution, thirdly, that for the purpose of promotion the seniority which is relevant

is not the seniority in the department but the seniority in the select list to be prepared in accordance with the resolution of 1957 in which the petitioners could not and did not find a place during the relevant period, fourthly, the basis of promotion being seniority-cum-merit the petitioners who had at no time complained that their names were not considered cannot complain of a violation of Article 14 or Article 16, nor could a writ of *mandamus* lie in such circumstances; and fifthly, that the resolutions to which references have been made and which are relied upon by the petitioners are not made either under Article 309 or any other provision of law but are merely executive instructions which the Government would be entitled to issue in the absence of rules which have statutory binding force. In so far as respondents who are allotted from Hyderabad service are concerned, it is contended that they were all selected by the Hyderabad Public Service Commission in June, 1956, and would have been appointed as Assistant Engineers in that State in a few months had not the States reorganisation taken place. In view of the fact that they had been selected by the predecessor State and also the successor State it was open to the Government to make the appointment of the respondents having regard to the various provisions of the State Reorganisation Act, and accordingly the Government directed that their appointments be treated as temporary Deputy Engineers effective from 31st March, 1957, for the purpose of seniority and promotion. What in fact the Government has done is to recognise the just claims of those who had already been selected for class I posts in the Hyderabad State which posts have been equated with the post of Deputy Engineers in the Bombay State while arriving at the equation envisaged under the States Reorganisation Act and under the allotted Government Service Rules of 1957. In fact the claim of the respondents was that the Assistant Engineers of Class I of the Hyderabad State should be equated with the posts of Assistant Engineers Class I of the Bombay State.

8. Shri Gupte, learned Counsel for the petitioners however contends that all the respondents from the erstwhile Hyderabad State were allotted to the Bombay State as overseers which posts they were holding

substantively on and after 1st November, 1956. They were thereafter promoted as officiating Deputy Engineers between 1958 and 1963 and were not confirmed in their respective posts on the date when they were appointed officiating Executive Engineers. The learned Advocate further contends that these persons were in fact not appointed as Assistant Engineers in the erstwhile Hyderabad State though they might have been selected by the Hyderabad Public Service Commission and that in any case as the Bombay Public Service Commission did not select them they could not be classified in the category of temporary Deputy Engineers selected by the Bombay Public Service Commission. Apart from this category, there are respondents who were appointed as officiating Deputy Engineers before the reorganisation on 1st November, 1956 and were confirmed only after the petitioners were directly appointed. The first petitioner was appointed on 9th June, 1959, the second petitioner on 11th June, 1959 and the third petitioner on 12th June, 1959. Though the petitioners were confirmed 2 years thereafter, namely, on 9th June, 1961, 24th June, 1961 and the 18th June, 1961 respectively, nonetheless for the purpose of seniority the dates on which they were first appointed in June 1959, would be relevant dates because confirmation under the rules relates back to that date and therefore they would be senior to those respondents who were confirmed thereafter. There are yet a few respondents who were promoted as officiating Deputy Engineers after the 1st November, 1956, namely, those persons who were non-gazetted sub-divisional officers of the former State of Madhya Pradesh and the former State of Hyderabad who were treated as Deputy Engineers from 1st November, 1956 and there were others who were not so deemed but were not confirmed as Deputy Engineers on the date when they were promoted as officiating Executive Engineers. The contention of Shri Gupte in the main is that officiating Deputy Engineers could only be considered as promoted to the grade of Deputy Engineers on confirmation and therefore the 7 years qualifying service necessary for their being promoted as officiating Executive Engineers is to be reckoned from the date of their confirmation as Deputy Engineers and since good many of them were confirmed after the

appointment of the petitioners and most of them were not so confirmed even on the date of their promotion as Executive Engineers under the rules they would not be entitled to those promotions. Shri Chagla and Shri Kumaramangalam, on the other hand contend that the rules nowhere prohibit the promotion to Executive Engineers from officiating Deputy Engineers, nor is there anything to indicate either expressly or otherwise that the 7 years qualifying service should be from the date of confirmation. All that is required is that a person in order to become eligible for promotion as officiating Deputy Engineer should be promoted as Deputy (Executive?) Engineer, that in either case he should have 7 years in that capacity whether as permanent Deputy Engineer or continuously as an officiating Deputy Engineer and that he should be selected and put on a select list. The respondents it is contended, have fulfilled all these requirements. The second respondent who appeared in person has adopted these arguments of the learned Advocate for the respondents.

9 We may here read the relevant rules as set out in the respective resolutions

“1957 Rules—

(1) Government should review in December each year the claims of all officers in the Bombay Service of Engineers, Class II for promotion to the posts of Executive Engineers by setting up a Committee consisting of the three Chief Engineers under the Chairmanship of the Senior Chief Engineer, which should draw up a select list of those considered by them suitable for promotion.

(2) The Committee should scrutinise the case of each officer and prepare a select list with due regard to the provisions of Government Resolution and Government Circular Memorandum, Political and Services Department Nos 4099/34 dated the 18th December, 1950. Only such officers should be selected for inclusion in the select list as have put in at least seven years' service (excluding the period of training but including the period of probation) in the grade of Deputy Engineer. The officers should also possess the necessary personality, initiative, strength of

character, fitness to assume independent responsibility and capacity for outdoor as well as office work. No officer should be included in the select list merely on the negative ground that he is not manifestly unfit.

(3) The seniority of the officers on the select list should be determined by the date of entry of their names in the select list. The seniority *inter se* of officers whose names are entered on the same day should be determined in accordance with their seniority in the Class II cadre, unless in consultation with the Commission, it is decided to give an officer accelerated promotion on account of really exceptional ability or qualification.

(4) The Committee should submit to Government the select list for approval in consultation with the Bombay Public Service Commission. While submitting the list, the Committee should give full justification for supersession involved, if any, and full information regarding qualifications and previous service of those recommended to be brought on the select list should be given.

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“1960 Rules—

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(6) (i) The number of posts to be filled in the Bombay Service of Engineers, Class I by promotion of officers from the Bombay Service of Engineers, Class II shall be about 25 per cent of the total number of superior posts, in the Bombay Service of Engineers Class I cadre, this percentage should be aimed at for confirmations made after 1st November, 1956, subject of course to Class II Officers of the requisite fitness and length of service being available.

(ii) For absorption into Class I, a Class II Officer must be in the per-

manent Bombay Service of Engineers, Class II cadre, should have at least 15 years service to his credit in Class II in temporary and permanent capacities, and should be holding an officiating divisional rank, at the time of such absorption. On such absorption, the Class II Officer shall be confirmed as an Executive Engineer.

(iii) The seniority of the Class II promotees shall be fixed below the bunch of Assistant Engineers, any one of whom is due for confirmation as Executive Engineer during that calendar year, provided that no Class II promotee shall be placed senior to a direct recruit to Class I Assistant Engineer who has been officiating as Executive Engineer from a date earlier than the Class II promotee. In the latter case, the Class II promotee, though holding a post and lien as a confirmed Executive Engineer shall be shown both under permanent Engineers, and, also along with the direct recruited Class I Assistant Engineers with a suitable remark under the Permanent Executive Engineers list. This is also subject to further conditions as in paragraph 7 below.

7. (i) Since the percentages in the superior posts of direct Class I recruits and promotees from Class II is to be about 75 and 25, the number of promotions from Class II in any year would be about one third the number of direct recruited Assistant Engineers confirmed as Executive Engineers during that year. Recruitments in the past have, however, been erratic and insufficient even to the extent of there being no recruitments to Class I in certain years. In order to deal with such situations, the following rules shall be supplemental and exceptional to those in paragraph 6 above:—

(ii) As far as possible, promotions as officiating Executive Engineers shall be so made that the promotee, under consideration from Class II has to his credit at least 6 years longer service than a promotee under consideration from Class I, subject, as far as practicable, to the condition that a Class I Officer shall not hold a divisional rank at less than 4, and a Class II Officer at less than 7 years service.

Subject to availabilities, and, the above criteria, an attempt should be made to maintain the percentages, stated in paragraph 6 (i) above, between direct Class I and promoted Class II officers in the total of permanent plus officiating superior posts.

(iii) In the interests of manning superior administrative ranks, it is considered necessary to have at least two confirmations to the Executive Engineers ranks every year. In years when this is not possible of achievement according to the percentages as per (i) above, the number of promotions from Class II may be increased to get the two confirmations, mentioned hereinabove.

Per contra, there would be a reduction in the percentage promotions from Class II in the following years in order to work up to the overall percentages of about 75 to 25.

(iv) Confirmations, if any, made from the bunch of Temporary Executive Engineers, who have, at present lien on no cadre, shall be counted against the 25 per cent. meant for the non-direct recruits to Bombay Service of Engineers, Class I.

8. (i) The Sub-Divisional posts in the Department are, at present, manned by direct recruits to Bombay Service of Engineers, Class II cadre, Deputy Engineers confirmed from subordinate Service of Engineers, the temporary Deputy Engineers recruited by the Bombay Public Service Commission, officiating Deputy Engineers and similar other categories. These various categories are being compiled into two lists only, *viz.*, Bombay Service of Engineers, Class II cadre of permanent Deputy Engineers and a list of officiating Deputy Engineers. The future recruitments to Bombay Service of Engineers, Class II cadre shall be made by nomination of candidates recruited direct by competitive examination, held by the Commission, and, by promotions from the list of officiating Deputy Engineers. The number of such promotions shall be about one-third the number of direct recruits appointed in that year.

(ii) All direct recruitment of temporary Deputy Engineers having been stopped,

further officiating vacancies will be manned from the ranks of the Subordinate Service of Engineers. For this purpose, a Statewise Select Seniority list will be maintained of members of the Subordinate Service of Engineers cadre, considered fit to hold sub-divisional charges. This list shall be compiled as on 30th June each year.

For inclusion in this list a graduate shall have to his credit not less than 3, a diploma holder not less than 8, and, a non-qualified person not less than 13 years' service as overseer.

For confirmation as a Deputy Engineer the Officer would be expected to have put in not less than 3 years' service as Officiating Deputy Engineer.

(iii) The probationers recruited directly to in the Bombay Service of Engineers, Class II cadre in any year shall, in a bunch, be placed senior to promotees confirmed during that year.

"1963 Rules—

(A) The seniority of direct recruits and promoted officers in the State services should be determined according to the date of appointment on probation in the case of direct recruits * * * * * and according to the date of promotion to officiate continuously in the case of these appointed by promotion, irrespective of whether the appointments are made in temporary or in permanent vacancies, subject to the provisions of the following clauses

* * * * *

(B) A list of services in respect of which special orders for fixation of seniority are in force and to which these orders will not apply will be issued in due course."

10 It would be apparent from the 1941 rules that they merely provide for fixation of seniority of the direct recruits and officers promoted to the substantive vacancies but have nothing to do with the qualifications required for promotion to the next higher rank. Rule 6 of 1960 deals with Class I posts. Clauses 1, 2 and 3 of this rule provide

(1) that 25 per cent posts in Class I are to be filled up by promotees, (2) that for absorption into Class I, Class II Officer must have (a) permanent service in Class II cadre, (b) have 15 years of service in Class II in temporary and permanent capacities and (c) that he must be holding an officiating divisional rank at the time of such absorption. Clause 3 deals with *inter se* seniority between the Assistant Engineers and Class II promotees to the post of Executive Engineers. The absorption referred to in rule 6 is a permanent absorption because clause 2 provides that on such absorption the Class II officers shall be confirmed as Executive Engineers. Clause 6 gives no indication that Class II officers whether direct recruits or promotees cannot be promoted as officiating Executive Engineers. That is dealt with by clause 2 of rule 7 which provides that Class II officers should have as far as possible at least 6 years longer service than the promotee under consideration from Class I, viz., Assistant Engineers, and further that he should at least have seven years' service. Even this rule does not indicate that the qualifying service of either of six years or of 7 years specified in the rule has to be permanent service. In clause (ii) of rule 6 it is provided that 15 years of service in Class II for absorption as Executive Engineer can be in temporary or permanent capacities. There is nothing in rule (ii) to militate against the interpretation that the service specified there can be the total service of any description whether provisional, temporary or permanent. If promotion from Class II as officiating Executive Engineer can only be made after 7 years of permanent service, then there would be no meaning in including the temporary service in Class II for the purpose of absorption as Executive Engineer. Even rule 8 upon which Shri Gupte has laid great emphasis in support of his contention, does not, in our view, justify an interpretation that the 7 years' service required to entitle persons in Class II for promotion as an officiating Executive Engineer should be permanent service in Class II. Shri Gupte however relied on the requirement in clause (ii) of rule 8 that the recruitment to Bombay Service of Engineers, Class II cadre shall in so far as promotees are concerned be by promotion from the list of officiating Deputy Engineers.

Relying on this rule the learned Advocate contends that for promotion as Deputy Engineer Class II he must be on the list of officiating Deputy Engineers before he is entitled to promotion as Deputy Engineer Class II and be confirmed in that post after satisfying the requirements of 3 years' service as officiating Deputy Engineer. Until he is so confirmed, he will not be considered to have been promoted as Deputy Engineer or to belong to Class II service for promotion as officiating Executive Engineer as required under clause (u) of rule 7. As we have seen earlier, clause (ii) of rule 7 does not use the word 'belong' but requires only that the person under consideration for promotion should be from Class II service. To be in Class II service the Deputy Engineer promoted from subordinate service has to put in at least 3 years of service as officiating Deputy Engineer before being confirmed and thereafter he can when he is promoted to the next higher rank be confirmed as Executive Engineer if he has put in 15 years in Class II service in temporary or permanent capacities and is holding an officiating divisional rank, namely of an Executive Engineer. If temporary service can be taken into account for confirmation as an Executive Engineer, so can officiating service, and if officiating service can be taken into consideration, there is no impediment to a Deputy Engineer with 7 years' service whether officiating, temporary or permanent to entitle him for promotion as an Executive Engineer.

11. The list that is referred to in clause (i) of rule 8 must be read with the further provision in that rule that for inclusion in that list of persons a graduate shall have to his credit not less than 3, a diploma holder not less than 8 and a non-qualified person not less than 13 years of service as overseers. In our view it is the list of such persons that is referred to in clause (u) of rule 8 and not that there should be a list of persons actually officiating as engineers for further promotion to the same post which will have little meaning, for there cannot be a promotion of a person in the same cadre of service who is already promoted whether as an officiating or temporary or permanent incumbent. If clause (i) of rule 8 provides that Class II cadre shall be recruited by competitive examination, the promotees also are

promoted from the list of persons considered fit to hold sub-divisional charge, i.e., posts of Deputy Engineers. If in the case of direct recruits the appointment is without reference to confirmation, it cannot be any different in the case of promotees.

12. We cannot, therefore, accept the contention of Shri Gupte that a promotee officiating Deputy Engineer Class II is not entitled to be considered for promotion under rule 7 to the post of an officiating Executive Engineer unless he has put in 7 years of service from the date of confirmation. On the other hand, the subsequent resolution of the Government of 1963 makes it abundantly clear that the seniority of promotees should be considered as from the date of promotion to officiate continuously irrespective of whether the appointments are made in temporary or permanent vacancies. It is no doubt submitted that this does not have the force of rules and cannot therefore have the effect of amending the rules of 1960. As we have already held on an interpretation of the rules of 1960 that they do not support the contention of the petitioners, the question whether the resolution has the force of rules may not be relevant in this context but nonetheless in our view, there is force in the contention of Shri Kumaramangalam, learned Advocate for the respondents, that even the 1960 rules have no statutory force and are no better than the executive instructions issued from time to time by means of resolutions. It may be observed that the rules referred to are part of the resolution of 1960. The resolution itself lays down the principles and in the end formulates those principles in terms of rules, which however are not purported to be made under any provision of law or even under Article 309. There also is nothing to indicate that the procedure and formalities required for making rules have been gone through.

13. It is next contended that the persons from the Hyderabad service did not have 7 years even as officiating Deputy Engineers but were only deemed to have been appointed as temporary engineers as from 31st March, 1957. This contention also, in our view has no force because the respondents who were from Hyderabad State were in fact selected by

the Hyderabad Public Service Commission as Assistant Engineers and would have been appointed as such but for the States Reorganisation Act which came into force as from 1st November, 1956. Had they been appointed earlier, they would have had to be equated with the posts in Bombay. In fact as the notification issued by the Hyderabad Public Service Commission furnished by Mr Joshi shows, the candidates who were to be selected were required to serve in any of the districts of Hyderabad State, Hyderabad, proper or according to the allocation in the reorganised set up of the State if and when it took place. It was, therefore, in the contemplation of the Public Service Commission that the State would be reorganised and the candidates selected may be required to serve in the reorganised State. The allocation of persons after the reorganisation from one State to the other was subject to the Reorganisation Act which dealt with matters pertaining to allocation, transfer, fixation of service conditions, seniority, etc. The claims of the respondents who were allotted from the Hyderabad State arose earlier than the appointments of the petitioners and the Government of Bombay and subsequently the Maharashtra Government was entitled to consider these claims and to give redress.

14 It is again argued that if they had a claim under the States Reorganisation Act, they should have been treated as Deputy Engineers from 1st November, 1956 and not from 31st March, 1957 and therefore they could not be considered as having been dealt with under the States Reorganisation Act. We are unable to accept the force of this argument because it was open to the Government of the State to which they were allotted to take into consideration the fact that they would have been appointed in the erstwhile State from a particular date, to treat them as such and to equate their posts which they would have held. In these circumstances there is no statutory bar or rule which prohibits the Government of Maharashtra from deeming their appointment as from 31st March, 1957 for the limited purpose of seniority and promotion.

15 Apart from these contentions it appears to us that there is another

formidable obstacle in the way of the petitioners' success and it is that under the 1957 Resolution for promotion to the post of officiating Executive Engineers, they should be put on the select list by a committee of the Chief Engineers to be prepared each year for that purpose. When promotions are made on the basis of seniority-cum merit, all that can be required is that persons entitled to promotion should be considered and if having been considered they have been left out, they would have no claim to promotion as a matter of right. In *State of Mysore v Syed Mahmood*¹, this Court had so held. Bachawat, J, speaking for the Court observed at page 366

"Where the promotion is based on seniority-cum merit the officer cannot claim promotion as a matter of right by virtue of his seniority alone. If he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted."

16 It is however stated that no list was made for 1966 which is the crucial year in so far as the petitioners are concerned because their 7 years would have been completed in June, 1965 and they would have been entitled to be considered for promotion in 1966. In answer to this contention the affidavit on behalf of the respondents shows that the select list of the Deputy Engineers fit for promotion to the post of Executive Engineers in Class I was prepared for the year 1964 and 1965 according to the principles and rules laid down in the resolutions of 14th December, 1957 and 29th April, 1960. None of the petitioners, it is averred, was included in the select list for 1964 or 1965 because not only did any of them not have the requisite seven years' service as Deputy Engineer at the relevant time but they were also not entitled to be included because of the classes of recommendation earned by them during the relevant period. The petitioners however denied in their rejoinder that the lists were prepared keeping in view the criteria laid down by the rules, but in our view it is significant that they did not possess the required length of service in Class II.

¹ (1968) 2 S.C.J. 713 (1968) 3 S.C.R. 363
AIR. 1963 SC 1113

for them to be entitled to promotion when the respondents were included in the list and promoted as such they cannot challenge the appointments made as being in violation of Article 14 or Article 16.

17. In the result these petitions merit dismissal and are accordingly dismissed.

V.K. ————— *Petitions dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—*V. Ramaswami and I.D. Dua, JJ.*

M/s. Munshilal Beniram Jain Glass Works, Firozabad, Uttar Pradesh

... *Appellant**

v.

Shri S. P. Singh, Assistant Labour Commissioner and Adjudicator, Uttar Pradesh, Kanpur and others, etc. . . . *Respondents.*

(A) *Uttar Pradesh Industrial Disputes (Amendment and Miscellaneous Provisions) Act (I of 1957), as amended by U.P. Industrial Disputes (Amendment and Miscellaneous Provisions) Act (XXIII of 1957), section 16—“Section 6-A of the Principal Act”—Meaning of.*

Section 6-A as mentioned in section 16 of the U.P. Industrial Disputes (Amendment and Miscellaneous Provisions) Act (I of 1957), as amended by U.P. Industrial Disputes (Amendment and Miscellaneous Provisions) Act (XXIII of 1957), refers to section 6-A as it stood in U.P. Act XXVIII of 1947, after its amendment by Uttar Pradesh Act I of 1957 and not to section 6-A as it stood prior to its amendment by Uttar Pradesh Act I of 1957.

[Para. 10.]

Central Distillery and Chemical Works Ltd. v. State of Uttar Pradesh, A.I.R. 1964 All. 156, Approved.

(B) *Uttar Pradesh Industrial Disputes (Amendment and Miscellaneous Provisions) Act (I of 1957), section 17—Scope.*

Section 17 only provides for delegated legislation in certain circumstances and resort to section 17 is not essential or a condition precedent for enforcing the awards.

[Para. 12.]

(C) *Uttar Pradesh Industrial Disputes Act (XXVIII of 1947), as amended by Act (I of 1957), section 6-A—“Award”—Meaning of—Should be liberally construed—Includes within its fold award of an adjudicator under U.P. Industrial Disputes Act.* [Para. 13.]

(D) *General Clauses Act (X of 1897), section 6—Scope and applicability.*

Section 6 would apply to a case of repeal even if there is a simultaneous enactment unless a contrary intention appears from the new enactment. Whenever there is a repeal of an enactment, the consequences laid down in section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject, one would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. It cannot therefore be said, as a broad proposition, that section 6 of the General Clauses Act is ruled out whenever there is a repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the proposition of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material.

[Para. 14.]

Appeals from the Judgment and Decree dated the 7th May, 1964 of the Allahabad High Court in Special Appeals Nos. 77 and 118 of 1960.

G.N. Dikshit, Advocate, for Appellant (In both the Appeals).

J.P. Goyal and S.N. Singh, Advocate, for Respondent No. 3 (In C.A. No. 1706 of 1968) and Respondent No. 1 (In C.A. No. 1707 of 1968).

C.B. Agarwala, Senior Advocate, (*O.P. Rana*, Advocate with him), for Respondent

*C.A. Nos. 1706 and 1707 of 1968.
27th October, 1969.

No 1 (In C A No 1706 of 1968) and Respondent No 2 (In C A No 1707 of 1968)

The Judgment of the Court was delivered by

Dua, J—In these two appeals on certificate of fitness, challenge is directed against the view taken by a Division Bench of the Allahabad High Court on appeal in disagreement with that of a learned Single Judge of that Court on the interpretation of section 16 of the Uttar Pradesh Industrial Disputes Act of 1957 and section 6 A, Uttar Pradesh Industrial Disputes Act of 1947

2 The relevant facts may first be briefly stated. In June, 1956 there was a strike in the glass factory of the appellant M/s Munshilal Beniram Glass Works, at Ferozabad. As a result the factory was closed down for some time. In August, 1956, a settlement was reached with the workers and it became possible to reassume operations from 31st August, 1956. The workers were asked to report personally, latest by 26th August, 1956, to show their willingness to work. According to the appellant, Lal Khan, one of the workers failed to register his willingness to work before the appointed day, and indeed he did not care to report in spite of a messenger having been sent to him requiring his attendance. In his place one Jang Jit was thereupon employed and intimation of this fact duly sent to Lal Khan. This gave rise to a controversy between Lal Khan and the employers with the result that the State Government purporting to act under sections 3, 4 and 8 of Uttar Pradesh Industrial Disputes Act referred the following dispute to the Adjudicator

“Whether the employers have wrongly and/or unjustifiably refused employment to Shri Lal Khan with effect from 18th /29th August 1957? If so, to what relief is he entitled?”

Soon after the reference the appellant presented a writ petition in the Allahabad High Court (C W No 890 of 1957) challenging its validity principally on the ground that there was no industrial dispute within the contemplation of the Industrial Disputes Act. As interim stay of the proceedings was declined, the proceedings before the adjudicator continued

and on 31st December, 1957, the adjudicator gave his award. This was followed by an order of the State Government dated 28th January, 1958, enforcing the award under sections 3 and 6 (2) of the Uttar Pradesh Industrial Disputes Act, 1947. The award and the order of the State Government were also challenged by the appellant by means of a writ petition in the High Court (C W No 1025 of 1958). Though principally in this writ petition the power of the State Government to enforce the award was questioned, challenge to the order of reference was also reiterated. A learned Single Judge allowed this later writ petition on 28th January, 1958, holding that the State Government had no power to enforce the award in question. According to the learned Single Judge the old section 6 having been replaced by a new section 6 by Uttar Pradesh Act I of 1957, it was not a case of repeal simpliciter and therefore old section 6 could not be resorted to by relying on section 6 (e) of the General Clauses Act.

3 On the matter having been taken on special appeal a Division Bench of the High Court following its earlier decision reported as *Central Distillery and Chemical Works Limited, Meerut v State of Uttar Pradesh*¹ reversed the order of the learned Single Judge and dismissed the writ petition.

4 The short question, the determination of which is decisive of these appeals, is whether section 6-A as mentioned in section 16 of the Uttar Pradesh Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956 (Uttar Pradesh Act I of 1957) as amended by Uttar Pradesh Industrial Disputes (Amendment and Miscellaneous Provisions) Act (XXIII of 1957), refers to section 6-A as it stood in Uttar Pradesh Act (XXVIII of 1947) prior to its amendment by Uttar Pradesh Act (I of 1957) or as it emerged after the said amendment. The learned Single Judge construed it to mean as it stood before the amendment of Uttar Pradesh Act (I of 1957) whereas according to the two Bench decisions section 16 refers to section 6-A as amended by Uttar Pradesh Act (I of 1957). We are required to determine which of these two views is correct.

5. Section 16 of Uttar Pradesh Act (I of 1957) as it stood prior to its amendment by Uttar Pradesh Act (XXIII of 1957) ran as follows :

*"Saving.—*16. If immediately before the commencement of this Act, there is pending any proceeding in relation to an industrial dispute before any authority constituted under the Uttar Pradesh Industrial Disputes Act, 1947, as in force before such commencement, the dispute may be adjudicated and the proceeding disposed of by that authority after such commencement, as if this Act had not been passed."

6. After amendment by Uttar Pradesh Act XXIII of 1957, this section read thus :

*"Saving.—*16. If immediately before the commencement of this Act, there is pending any proceeding in relation to an industrial dispute before any authority constituted under the Uttar Pradesh Industrial Disputes Act, 1947, as in force before such commencement, the dispute may be adjudicated and the proceeding disposed of by that authority after such commencement, as if this Act had not been passed,

and the provisions of section 6-A of the Principal Act shall remain enforceable with reference to such a proceeding."

7. The words added as a result of the amendment by Uttar Pradesh Act (XXIII of 1957) had been deleted by this very amending Act from sub-section 2 of section 17 of Uttar Pradesh Act (I of 1957).

8. We may now turn to the history of section 6-A. This section was inserted in the Uttar Pradesh Industrial Disputes Act (XXVIII of 1947) by the Uttar Pradesh Industrial Disputes Act (XXIII of 1953) in the following forms :

"6-A. Where any period is specified or is required to be specified in any order made under or in pursuance of this Act referring any industrial dispute for adjudication within which the award shall be made, declared or submitted it shall be competent for the State Government from time to time, to enlarge such period even though the period originally fixed or enlarged may have expired or the award made."

9. This amendment had retrospective effect because it was to be deemed to have always been added in the Uttar Pradesh Industrial Disputes Act (I of 1947) which was described as the "Principal Act". In 1957 by means of Uttar Pradesh Act (I of 1957) which extensively amended the Act (I of 1947), section 6-A was replaced by the following new section 6-A :

"6-A. Commencement of the Award.—

(1) An award (including an arbitration award) shall become enforceable on the expiry of thirty days from the date of its publication under section 6 :

Provided that if the State Government is of the opinion that it will be inexpedient, on grounds of social justice, to give effect to the whole or any part of the award, the State Government may, by notification in the official Gazette, declare that the award shall not become enforceable on the expiry of the said period of thirty days :

Provided further that an arbitration award shall not become enforceable where the State Government after such enquiry as it considers necessary, is satisfied that the same has been given or obtained through collusion, fraud or misrepresentation.

(2) Where any declaration has been made in relation to an award under the first proviso to sub-section (1) the State Government may within ninety days from the date of publication of the award under section 6, make an order rejecting or modifying the award, and shall on the first available opportunity lay the award together with a copy of the order before the Legislature of the State.

(3) Where any award as rejected or modified by an order made under sub-section (2) is laid before the Legislature of the State, such award shall become enforceable on the expiry of fifteen days from the date on which it is so laid and where no order under sub-section (2) is made in pursuance of a declaration under the first proviso to sub-section (1), the award shall become enforceable on the expiry of the period of ninety days referred to in sub-section (2).

(4) Subject to the provisions of sub-sections (1) and (3) regarding the enforceability of an award, the award shall

come into operation with effect from such date as may be specified therein, but where no date is specified it shall come into operation on the date when the award becomes enforceable under sub-section (1) or sub-section (3) as the case may be "

10 This enactment was enforced with effect from 16th April, 1957. The Uttar Pradesh Act (XXIII of 1957) which was published in the Government Gazette on 3rd November 1957, as noticed earlier, amended section 16. *Prima facie* this amendment in section 16 made in November, 1957 should be referable to section, 6-A in the form in which it existed on the date of the enforcement of the amending Act in question (Uttar Pradesh Act XXIII of 1957). It was contended on behalf of the appellant that the very fact that the amendment of section 16 was retrospective so as to date back to 16th April, 1957, when section 16 itself was originally enacted, indicates that section 6-A as it existed prior to 16th April 1957, was intended to be kept alive. Now looking at the position as it stood on 16th April, 1957, it would be seen that section 16 was designed to save the pending proceedings from the operation of Uttar Pradesh Act (I of 1957) itself. If this Act was held to be inapplicable, then section 6-A as amended thereby would be excluded and that section as it stood prior to the amendment by Uttar Pradesh Act (I of 1957) would automatically be attracted. The question arises where was then the occasion to provide specifically for applying to the pending proceedings section 6-A as it stood before Uttar Pradesh Act (I of 1957)? It may, of course, be contended that it was so done by way of abundant caution. To us, however, it seems that to specifically incorporate section 6-A in section 16 in this situation is suggestive of the intention of the Legislature to extend the amended section 6-A to the proceedings contemplated by section 16. The enactment under consideration is not an example of ideal draftsmanship and the provisions under consideration may admit of two constructions. Assuming the two constructions to be possible we are not satisfied that the construction placed on this provision by the two Benches of the Allahabad High Court is clearly erroneous justifying reversal of the view taken therein and thereby unsettling

the legal position. On the other hand to uphold the view of the learned Single Judge would also render the awards like the present to be unenforceable, which intention is difficult to impute to the Legislature. And then this point is not likely to arise very frequently in future, the matter being confined only to the cases which were pending when Uttar Pradesh Act (I of 1957) was enforced. The enactment is also confined in its operation to the State of Uttar Pradesh alone.

11 The appellant's Counsel next contended that the proceeding in question pending with the adjudicator could not be considered to be pending with the State Government and the State Government could not give effect to the decision of the adjudicator under section 16. It was argued that it was only the Authority before which the proceeding was actually pending immediately after the commencement of Uttar Pradesh Act (I of 1957) which was empowered to dispose of and the proceeding in the present case being pending before an adjudicator, the State Government could not claim any power under this section. It was added that the State Government could also not be treated as the authority constituted under the said Act. In our opinion the proceeding in question was clearly pending before the adjudicator as contemplated by section 16. The adjudicator therefore, could plainly proceed to adjudicate upon the dispute. On his adjudication the provisions of section 6 A would be attracted and thereunder the State Government could enforce it. This submission of the appellant is, therefore, repelled. On the view that we have taken it is not necessary to decide whether the State Government is an authority constituted under the Act as envisaged by section 16 and also whether the proceeding in question could be considered to be pending before the State Government.

12 The appellant's Counsel also submitted that without resort to section 17 of Uttar Pradesh Act (I of 1957) the award could not be enforced. This argument too need not detain us as it does not arise on the view we have taken. We may, however, point out that section 17 only provides for delegated legislation in certain circumstances and resort to section 17 is not essential or a condition precedent for

enforcing the awards, as suggested on behalf of the appellant.

13. The appellant's learned Advocate as a last resort submitted that the decision of the adjudicator is not an 'award' as defined in section 2 (c) of the Uttar Pradesh Industrial Disputes Act as amended by Uttar Pradesh Act (I of 1957). Now if Uttar Pradesh Act (I of 1957) is excluded from its application to pending proceeding under section 16 then the word 'award' has to be liberally construed and so construed it would be covered by section 6-A. The power conferred by sections 16 and 6-A has to be construed as real and not illusory and it has to be interpreted so as to achieve the purpose for which it was conferred.

14. We must not be understood to accord our approval to the view of the learned Single Judge that section 6 of the principal Act having not been repealed *simpliciter*, but having been replaced by a new section 6 by Uttar Pradesh Act (I of 1957), the principle underlying section 6 (e) of the General Clauses Act cannot be attracted. In our opinion, this approach is not quite correct. Section 6 would seem to us to apply to a case of repeal even if there is a simultaneous enactment unless a contrary intention appears from the new enactment. As observed by this Court in the *State of Punjab v. Mohar Singh*¹, whenever there is a repeal of an enactment, the consequences laid down in section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that section 6 of the General Clauses Act is ruled out whenever there is a repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention

incompatible with or contrary to the proposition of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material.

15. The result is that these appeals fail and are dismissed with costs.

V.K.

— Appeals dismissed.

THE SUPREME COURT OF INDIA*

(Criminal Appellate Jurisdiction.)

PRESENT :—*S.M. Sikri and K.S. Hegde, JJ.*

The State of Gujarat and another.

... *Appellants**

v.

Acharya Shri Devendraprasadji Pande and others, etc. ... *Respondents.*

(A) *Bombay Public Trusts Act (XXIX of 1950), section 35 (1)—Offence under—Mens rea, if a necessary ingredient.*

Where an offence is created by statute, however comprehensive and unqualified the language of the statute, it is usually understood as silently requiring that the element of *mens rea* should be imported into the definition of the crime, unless a contrary intention is expressed or implied. But this rule has several exceptions. One is a class of acts which are not criminal in any real sense, but are acts which are, in the public interest prohibited under a penalty. Another class comprehends some, and perhaps all, public nuisances. Lastly there may be cases in which, although the proceedings is criminal in form, it is really only a summary mode of enforcing a civil right. [Paras. 10 and 12.]

Section 35 (1) of the Bombay Public Trusts Act creates a quasi-criminal offence. It is a regulatory provision. It is enacted with a view to safeguard the interest of the public regarding trust money. The offence is punishable only with fine. The conviction does not carry any stigma. The language appears to make its contravention an absolute liability. Consequently, the offence under section 35 (1) is an absolute one and the requirement of *mens rea* cannot be read into it.

[Para. 14.]

* CrI. A. Nos. 2 to 12 of 1968.

12th October, 1970.

(B) *Criminal Procedure Code (V of 1898)*, section 342—*Statement of accused under—Conviction, when can be based on*

The statement of the accused under section 342 has to be accepted as a whole or not to be relied on at all. It cannot be split up into various parts and only a part accepted to base a conviction thereon. [Para 5]

Appeals by Special Leave from the Judgment and Orders dated the 25th June, 1965 and 20th February, 1967 of the Gujarat High Court in Criminal Appeals No 828 of 1965, etc etc

Mrs Urmila Kapoor and S P Nayar, Advocates, for Appellants

V K Sanghi, Advocate and *J B Dadachany & Co*, Advocates, for Respondents

The Judgment of the Court was delivered by

Hegde, J—These appeals arise from two complaints filed by the Charity Commissioner, State of Gujarat under section 35 (1) read with section 66 of the Bombay Public Trusts Act, 1950 (which will hereinafter be referred to as the Act). In those complaints 10 accused were proceeded against. It was said that they were the trustees of two trusts known as "Shree Swaminarayan Mandir" and "Narayan Mandir". The 1st accused in both those complaints was the Acharya, the 10th was said to be the Mahant and the other accused the associated trustees at the relevant time. It was said that all these trustees were appointed under two different schemes framed by the High Court of Bombay. The trial Court convicted the accused but in appeal the High Court of Gujarat acquitted all of them. It held that there is no proof to show that accused 2 to 10 were the trustees of the institutions at the time the alleged offence took place. It allowed the appeal of the 1st accused on the ground that the prosecution has failed to prove the required *mens rea* on his part. The State of Gujarat and the Charity Commissioner have brought these appeals after obtaining Special Leave from this Court.

2 In the first complaint the allegation is that the 1st accused withdrew from the trust funds in Samvat year 2014 a sum of Rs 30 277 53 for meeting his income tax liability and that he reimbursed that amount only in Samvat year 2018. The

allegation against the other accused is that they allowed the 1st accused to utilize the amount in contravention of the law. In the second complaint the allegation is that the 1st accused withdrew a sum of Rs 40,653 56 in the Samvat year 2014 again for meeting income tax liability and that he reimbursed that amount also in the Samvat year 2018 and that the other accused connived at the contravention of the law by the 1st accused.

3 Accused 2 to 10 pleaded that they were not the trustees of the institutions concerned during the Samvat years 2014 and 2015 and nor were they aware of the withdrawals and as such they are not guilty of any offence. The 1st accused admitted the withdrawals mentioned in the complaints but his case was that the withdrawals were made from his Hathu Khata, a Khata built up by him and his ancestors and he has put back that amount.

4 So far as accused 2 to 10 are concerned there is absolutely no evidence against them. The only witness examined on behalf of the complainant, namely, the Legal Advisor of the Charity Commissioner did not give any evidence against them. No material was placed before the Court to show that they were the trustees of the trusts in question during the Samvat years 2014 and 2015. This is not a case where a trustee has failed to deposit the amounts in his hands but is a case of unauthorised withdrawals. There is no evidence to show that accused 2 to 10 knew about those withdrawals even if we assume that they were the trustees during the Samvat years 2014 and 2015. Hence the case against them must necessarily fail.

5 Now coming to accused No 1 his case is that he withdrew the amount from his Hathu Khata which Khata according to him is his private Khata. There is no contra evidence. The complainant's witness admitted during his cross-examination that accused No 1 kept a huge sum with the trust and that no interest was given to him in respect of that amount. It is not possible to come to the conclusion, on the basis of the evidence of PW 1 that accused No 1 had withdrawn any amount belonging to the trust. In order to prove the case put forward in the complaints, reliance

was sought to be placed on a letter said to have been sent by the accused to the Charity Commissioner. The original letter was not produced; only an alleged copy of the same was put on record. No witness has proved the letter said to have been written by accused No. 1, nor is there any evidence to show that the copy produced is a true copy of the letter said to have been sent by accused No. 1. We are asked to infer the guilt of the accused No. 1 on the basis of the statement made by him under section 342, Criminal Procedure Code. We cannot split that statement into various parts and accept a portion and reject the rest. We have to either accept that statement as a whole or not rely on it at all. In his statement the accused pleaded that he was not guilty and if his statement is taken as a whole, it does not show that he was guilty of any offence.

6. Our above conclusion is sufficient to dispose of these appeals but as the High Court has elaborately gone into the question whether the requirement of *mens rea* is a necessary ingredient of section 35 (1), we shall proceed to examine that question.

7. The High Court primarily addressed itself to the question whether the Court should read into section 35 of the Act, the requirements of *mens rea*. Section 35 (1) reads :

“Where the trust property consists of money and cannot be applied immediately or at any early date to the purposes of the public trust the trustee shall be bound (notwithstanding any direction contained in the instrument of the trust) to deposit the money in any scheduled bank as defined in the Reserve Bank of India Act, 1934, in the Postal Savings Bank or in a Co-operative Bank approved by the State Government for the purpose or to invest it in public securities :

Provided that such money may be invested in the first mortgage of immovable property situate in (any part of India) if the property is not leasehold for a term of years and the value of the property exceeds by one-half the mortgage money :

Provided further that the Charity Commissioner may by general or spe-

cial order permit the trustee of any public trust or classes of such trusts to invest the money in any other manner.”

8. Assuming that the requirement of *mens rea* is a necessary ingredient of the offence under section 35 (1) and further that the facts pleaded in the complaints are correct then there can be hardly any difficulty in coming to the conclusion that the accused had the required intention. He is said to have withdrawn monies from the trust fund and utilised the same for his private purpose.

9. It may be noted that the requirement of section 35 (1) that a trustee should invest in proper securities the trust monies, not required for immediate use merely emphasises an obvious duty of the trustee. Section 35 (1) imposes certain penalty on the trustee if he fails to do his duty. The purpose of section 35 (1) is to safeguard the trust funds and also to guard against its misappropriation and misapplication. The Trust Act as well as section 35 (1) imposes a duty on the trustee. The language of the provision shows that the liability imposed on the trustee is absolute. The provision is regulatory provision enacted in public interest. For the contravention of section 35 (1) only a fine can be imposed and the punishment does not carry with it any stigma.

10. The question whether a crime can be said to have been committed without the necessary *mens rea* has led to considerable controversy. The broad principles accepted by Courts in this country as well as in England are : Where an offence is created by a statute, however comprehensive and unqualified the language of the statute, it is usually understood as silently requiring that the element of *mens rea* should be imported into the definition of the crime, unless a contrary intention is expressed or implied. In other words, the plain words of the statute are read subject to a presumption, which may be rebutted, that the general rule of law that no crime can be committed unless there is *mens rea* has not been ousted by the particular enactment. The *mens rea* means some blameworthy mental condition, whether constituted by knowledge or intention or otherwise. But this rule has several exceptions, as observ-

ed by Lord Evershed in *Lim Chin Aik v The Queen*¹

"Where the subject matter of the statute is the regulation for the public welfare of a particular activity—statutes regulating the sale of food and drink are to be found among the earliest examples—it can be and frequently has been inferred that the Legislature intended that such activities should be carried out under conditions of strict liability. The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of *mens rea*.

11 As long back as 1895 Wright, J, observed in *Sherras v De Rutzen*²

"There is a presumption that *mens rea*, an evil intention, or knowledge of the wrongfulness of the act is an essential ingredient in every offence, but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered."

12 It is further observed therein that the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which are not criminal in any real sense, but are acts which in the public interest prohibited under a penalty. Another class comprehends some, and perhaps all, public nuisances. Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right. But, except in such cases as these, there must in general be guilty knowledge on the part of the defendant or of some one whom he has put in his place to act for him, generally, or in the particular matter, in order to constitute an offence. The present case, in our opinion, falls within the first category mentioned above—section 35 (1) deals with a quasi-criminal Act

13 This Court in *Ravula Hariprasada Rao v The State*¹, ruled that unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of the crime, a person should not be found guilty of an offence against the criminal law unless he has got a guilty mind. The same view was reiterated by this Court in *State of Maharashtra v Mayer Hans George*². But in both those cases this Court recognised that the language of a provision either plainly or by necessary implication can rule out the application of that presumption. Further the Court may decline to draw that presumption taking into consideration the purpose intended to be served by that provision. In fact in *Ravula Hariprasada Rao's case*¹, this Court held that the liability imposed under section 27 (A) of the Motor Spirit Rationing Order, 1941 is an absolute liability. The law on this point was elaborately discussed by the House of Lords in *Surety v Parsley*³. Therein it was laid down that it is a general principle of construction of any enactment which creates a criminal offence that, even where the words used to describe the prohibited conduct would not in any other context connote the necessity for any particular mental element they are nevertheless to be read as subject to the implication that a necessary element in the offence is the absence of a belief, held honestly and on reasonable grounds, in the existence of facts which, if true, would make the act innocent. In the course of his speech Lord Reid, observed after referring to the well known observations of Wright, J to which we have already made reference

"It does not in the least follow that when one is dealing with a truly criminal act it is sufficient merely to have regard to the subject matter of the enactment. One must put one-self in the position of a legislator. It has long been the practice to recognise absolute offences in this class of quasi-criminal acts, and one can safely assume that, when Parliament is passing

1. L.R. (1963) A.C. 160

2. (1895) 1 Q.B. 918

1 (1951) S.C.J. 296 (1951) 1 M.L.J. 612
(1951) S.C.R. 322 A.I.R. 1951 S.C. 204

2. (1966) M.L.J. (Cri.) 248 (1966) 1 S.C.J. 363 (1965) 1 S.C.R. 123 A.I.R. 1965 S.C. 722.

3 (1969) 2 W.L.R. 470

new legislation dealing with this class of offences, its silence as to *mens rea* means that the old practice is to apply. But when one comes to acts of a truly criminal character, it appears to me that there are at least two other factors which any reasonable legislator would have in mind. In the first place a stigma still attaches to any person convicted of a truly criminal offence, and the more serious or more disgraceful the offence the greater the stigma. So he would have to consider whether, in a case of this gravity, the public interest really requires that an innocent person should be prevented from proving his innocence in order that fewer guilty men may escape."

14. Section 35 (1) of the Act creates a quasi-criminal offence. It is a regulatory provision. It is enacted with a view to safeguard the interest of the public regarding trust money. The offence in question is punishable only with fine. The conviction under that does not carry any stigma. The language of the provision appears to make its contravention an absolute liability. Under these circumstances, we think the offence mentioned in that section is an absolute one. Consequently we cannot read into it the requirement of *mens rea*.

15. For the reasons mentioned above these appeals fail and they are dismissed.

V.K. ——— Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—S. M. Sikri, V. Bhargava and I. D. Dua, JJ.

Shri Tarachand ... Appellant*
v.

Superintendent of Central Excise,
Bangalore ... Respondent.

(A) Defence of India Rules, (1962) (as amended in 1963), Part XII-A and rule 126-Q—Notification dated 10th January, 1963 as modified on 5th November, 1963 issued under rule 126-X read with rule 126-J (4)—Offences under Part XII-A—Prosecution for—Authority competent to institute.

Under rule 126-Q of the Defence of India Rules as read in the light of entries

at Serial No. 10 of the notification, dated 10th January, 1963, as modified by the notification, dated 5th November, 1963, issued by the Government of India in exercise of the powers conferred on it by rule 126-X read with rule 126-J (4) of the Defence of India Rules, prosecution for an offence punishable under Part XII-A of the Defence of India Rules, can be instituted by or with the consent of an officer not inferior in rank of the Assistant Collector of the Central Excise Department. Keeping in view the multifarious activities of the higher officers of the Central Excise Department it seems that after the responsible officers of this department not inferior in rank to the Assistant Collector had applied their mind and come to a decision as to the desirability of starting the prosecution in a given case further steps in the matter of actual prosecution including the drafting and presentation of the complaint can be lawfully carried out by others. That this is the real object of the notifications mentioned above is clearly brought out on a plain reading of their language.

[Para. 13.]

(B) Criminal Procedure Code (V of 1898), section 537 (b)—Scope—Vagueness in complaint and charge—Effect of.

When all the relevant and salient facts, alleged by prosecution were admitted by the accused, there can hardly be any question of prejudice caused to accused by the wide language of the complaint and the charge.

[Para. 14.]

Appeal by Special Leave from the Judgment and Order, dated the 8th February, 1968 of the Mysore High Court in Criminal Appeal No. 215 of 1966.

V. M. Tarkunde, Senior Advocate (R. Jethmalani, N. H. Hingorani and Mrs. K. Hingorani, Advocates, with him), for Appellant.

S. P. Nayyar, Advocate, for Respondent.

The Judgment of the Court was delivered by

Dua, J.—This appeal by Special Leave is directed against the judgment and order of the Mysore High Court on appeal setting aside in part the order of the appellant's acquittal by a Second Class Magistrate and convicting him under rule 126-P (2) of the Defence of India Rules, as amended in 1963—hereafter

called the Rules—and sentencing him to rigorous imprisonment for six months. The order of the trial Court acquitting him of the offence under section 135 of the Customs Act was upheld.

2 The appellant alighted from a service plane at H A L Aerodrome, Bangalore, on 16th November, 1963, at about 12.45 in the afternoon. E R Fariman, Inspector, C I D, had prior incriminating information about the arrival of person whose description seemed to tally with that of the appellant. The Inspector and his staff who were on the look out waited for the appellant to take his baggage from the baggage counter. As soon as the appellant took delivery of a plastic bag and a hold all the Inspector asked the appellant to accompany him to the Security Room. On being questioned the appellant gave his name as Tara Chand though he admitted that he had travelled under the name of J D Shaw. In the Security Room in the presence of Panchwatdars the plastic bag and the hold all were opened and examined. From a pillow taken out of the hold all were found two tape bags containing sixteen pieces of gold with foreign markings. These tape bags had been put into the pillow which was then stitched. The appellant was then produced by the Inspector before his D S P, along with the articles seized from him. After obtaining sanction from the Collector under section 137 (1) of the Customs Act and under rule 126-Q of the Rules, Shri Rasool, Superintendent of Central Excise (P W 3) filed the complaint.

3 The learned Magistrate trying the appellant found the gold pieces to be of foreign origin. He, however, did not find any evidence establishing them to be smuggled with the result that the appellant was acquitted of the offence under section 135 of the Customs Act. The learned Magistrate did not draw any presumption against the appellant because the seizure of the gold pieces was not by the customs authorities but by the police who thereafter handed over the gold pieces to the office of the Collector of Central Excise and Customs.

4 While considering the case against the appellant under rule 126-P (2) of the Rules, the learned Magistrate observed that according to the relevant notification issued by the Government of India

on 5th November, 1963, in modification of the earlier one issued under rule 126-J read with rule 126-X of the Rules, it is either the Assistant Collector of Central Excise or the Collector of Central Excise who can institute prosecution. These officers are not authorised to delegate the power to institute prosecution. According to the learned Magistrate the Collector of Excise had, therefore, no power to delegate the right to institute prosecutions with which he alone had been clothed. Exhibit P-5 was in the circumstances considered to be ineffective. On this reasoning the complaint having not been filed by the officer competently authorised the appellant was acquitted.

5 On appeal by the Superintendent of Central Excise and Customs (the complainant in the case) the High Court disagreed with the view taken by the learned Magistrate. It may be pointed out that the appeal by the complainant was confined only to the acquittal under rule 126-P (2) of the Rules and the appellant's acquittal under section 135 of the Customs Act was not questioned, it being conceded that there was no evidence on the record to bring the appellant's case under section 135 of the Customs Act.

6 The High Court relying on Exhibit P 5 and the two notifications issued by the Government of India came to the conclusion that the Collector was lawfully empowered to authorise the Superintendent of Central Excise to prosecute the appellant. That Court also arrived at the conclusion that the appellant, who was not a dealer or refiner, having a licence, was found in possession of gold, of which no declaration had been made under the law and therefore, he was guilty of an offence punishable under rule 126-P (2) of the Rules. The appeal was accordingly allowed and the appellant convicted and sentenced to rigorous imprisonment for six months.

7 In this Court Shri Tarkunde assailed the legality of the view taken by the High Court. According to him the trial Court had rightly held the prosecution not to have been instituted by a duly authorised person. Let us see if the scheme of the relevant statutory provisions supports the learned Counsel.

8 Part XII-A of the Rules deals with Gold Control and it contains rules 126-A

to 126-Z. This part was inserted in the Defence of India Rules in January, 1963. Rule 126-Q provides:

“(1) No prosecution for any offence punishable under this Part shall be instituted against any person except by, or with the consent of, the Administrator or any person authorised by the Administrator in this behalf.

(2) Nothing in rule 154 shall apply to any contravention of any provision of this Part or any order made thereunder.”

The word “Administrator” was substituted for the word “Board” in September, 1963. We are informed that no Administrator as defined in rule 126-A (a) was appointed by the Central Government under power conferred on it by rule 126-J (1). Under rule 126-X the Central Government is empowered to perform all or any of the functions of the Administrator and also by notification to exercise all or any of the powers conferred on the Administrator by Part XII-A is considered necessary or expedient in the public interest to do so. The Administrator who is to take suitable measures: (a) to discourage the use and consumption of gold, (b) to bring about conditions tending to reduce the demand for gold, and (c) to advise the Central Government on all matters relating to gold, is enjoined by rule 126-J (3) to discharge his functions subject to the general control and directions of the Central Government. Sub-rules (4) and (5) of rule 126-J provide:

“(4) The Administrator may by general or special order authorise such person as he thinks fit to exercise all or any of the powers exercisable by him under this Part and different persons may be authorised to exercise different powers:

Provided that no officer below the rank of Collector of Customs or Central Excise or Collector of a district shall be authorised to hear appeals under sub-rule (3) of rule 126-M.

(5) Subject to any general or special direction given or condition attached by the Administrator any person authorised by the Administrator to exercise any powers may exercise these powers in the same manner and with the same effect as if they had been conferred on

that person directly by this Part and not by way of authorisation.”

9. We may bear in mind the effect of sub-rule (5) on the scheme. Rule 126-H (2) (d) dealing with restrictions on possession and sale of gold by persons other than licensed holders lays down:

“(2) Save as otherwise provided in this Part,—

* * * *

(d) no person other than a dealer licensed under this Part shall buy or otherwise acquire or agree to buy or otherwise acquire, gold, not being ornament, except,

(i) by succession, intestate or testamentary, or

(ii) in accordance with a permit granted by the Administrator or in accordance with such authorisation as the Administrator may, by general or special order make in this behalf:

Provided that a refiner may buy or accept gold from a dealer licensed under this Part.”

Turning now to the two notifications on the construction of which the fate of this case depends, we find that on 10th January, 1963, the Central Government issued a notification in exercise of the powers conferred on it by rule 126-X read with rule 126-J (4) authorising certain officers of the Central Excise Department to exercise any or all of the powers of the Gold Board in relation to certain matters specified therein. At Serial No. 10 of the Table contained in the notification officers not inferior in rank to the Assistant Collector were authorised to exercise powers and functions, in relation to the matter of “accrual of sanctions for the prosecution of offences” with reference to rule 126-Q. We have reproduced the exact words of the entry in column 4 of the Table. This notification was amended in certain respects on 5th November, 1963. At Serial No. 10 of the amended Table officers not inferior in rank to the Assistant Collector of Central Excise Department were authorised to exercise the powers and functions in relation to the matter of “Institution of prosecution for any offence punishable under Part

XII-A of the Defence of India Rules," with reference to rule 126-Q. Here against we have reproduced the exact words used

10 According to Shri Tarkunde these notifications did not empower the Assistant Collector to authorise the Superintendent of Central Excise and Customs to institute the present proceedings. The Assistant Collector, said the Counsel, was authorised only himself to institute them and he could not lawfully accord consent for the institution of prosecution as the purported to do under Exhibit P 5. We are unable to accept this submission. The actual wording of the relevant entries in all the columns of Serial No. 10 in the Table of the later notification may here be reproduced

"10 Assistant Col Institution of
lector of the Central prosecution for any
Excise Department offence punishable
126-Q under Part XII-A
of the Defence of
India Rules, 1962 "

This has to be read along with the opening part of the earlier notification dated 10th January, 1963 which remains the principal notification and was amended only in certain particulars on 5th November, 1963. According to the opening part of the principal notification the officers not inferior in rank to the officers specified in column 2 of its Table were authorised to exercise any or all of the powers of the Gold Board in relation to the matters specified in the corresponding entries in columns 3 and 4. In place of "Gold Board" we have to read the word "Administrator" and since no Administrator was ever appointed the powers and functions entrusted to him were at the relevant time being exercised by the Central Government. We may point out that it was apparently by oversight that the word "Administrator" was not substituted for the expression "Gold Board" in the notification though in September, 1963 such substitution had been effected by appropriate amendment in the relevant Rules. This was not controverted at the Bar and indeed no point was sought to be made on this ground. It would thus be seen that in determining the scope and extent of the power of the officers authorised in the Table of the notification to exercise the

powers and functions of the Administrator, actually exercised by the Central Government (there being no Administrator appointed under the rules), we have to see the nature of the power and function mentioned in column 4 and examine it by reference to the rule mentioned in column 3 in the light of the expression "in relation to the matters specified" in the notification which, in our opinion to some extent widens the scope of the powers and functions delegated by the notification.

11 Under rule 126-Q as read in the light of the entries at Serial No. 10 of the notification, prosecution for an offence punishable under Part XII-A can, in our opinion, be instituted by or with the consent of an officer not inferior in rank to the Assistant Collector of the Central Excise Department. In Exhibit P 5, dated 4th September, 1964, Shri V. Parthasarathy, Collector of Central Excise accorded his sanction to the prosecution of the appellant as required under rule 126-Q of the Defence of India Rules. He did so in exercise of the powers conferred on him by the two notifications mentioned above. The offence for which the consent was given was described in this document as under

"WHEREAS Shri Tarachand, son of Deviraj (Devichand), Room No. 4, Mistri Bungalow, Duncan Road, Bombay 4 was found to have acquired gold not being ornament except by succession, intestate or testamentary or in accordance with the permit granted either by the Administrator or by the Deputy Secretary in the office of the Gold Control Administrator, Bombay, duly authorised in this behalf by the Government of India *vide* their notification No. F 1/8/63 GC, dated 20th October, 1963 16 pieces of gold of 10 tolas each bearing markings as to its origin and purity contrary to the provisions of rule 126-H (d) of the Defence of India (Amendment) Rules

WHEREAS any person having in his possession or in his control any quantity of gold or buys or otherwise acquires or accepts gold in contravention of any provisions of Part XII-A of the Defence of India Rules renders himself liable for punishment under rule 126-P (2)

AND on careful study of the material placed before me and satisfying myself that the said Shri Tarachand is liable to action under rule 126-P (2), of the Defence of India (Amendment) Rules, 1963, for reasons mentioned above. I, V. Parthasarathy, Collector of Central Excise, Mysore Collectorate, Bangalore, in exercise of the powers conferred on me by the Government of India in their Notification F. No. 25/1/63-GCR, dated 5th November, 1963, issued under rule 126-J read with rule 126-X of the Defence of India (Amendment) Rules do hereby accord consent for the institution of prosecution of the said Shri Tarachand as required under rule 126-Q of the Defence of India (Amendment) Rules, 1968."

12. This authority, in our opinion, quite clearly falls within the notification read as a whole and the High Court was right in so construing it.

13. The submission that these notifications must be construed strictly because by these instruments the authority to prosecute is delegated and so construed they should be held to confer power only to prosecute but not to accord consent to the appellant's prosecution by some other person or authority has not impressed us. The attempt by the appellant's learned Counsel in this connection to equate these notifications with powers of attorney does not carry the matter any further. The plain reading of the relevant entries in the notifications leaves no doubt in our mind as to its meaning, scope and effect. It quite clearly authorises the Collector to exercise the power and function in relation to the matter of institution of prosecution for any offence punishable under Part XII-A of the Rules referred to in rule 126-Q. Keeping in view the multifarious activities of the higher officers of the Central Excise Department it seems to us that after the responsible officers of this Department not inferior in rank to the Assistant Collector had applied their mind and come to a decision as to the desirability of starting the prosecution in a given case further steps in the matter of actual prosecution including the drafting and presentation of the complaint can be lawfully carried out by others. That this is the

real object and purpose of the notifications is clearly brought out on plain reading of their language. To hold otherwise, as desired by Shri Tarkunde, would not only mean unduly straining the unambiguous statutory language but would also tend to thwart, instead of effectuating, their real purpose. We are thus in agreement with the view taken by the High Court.

14. The Counsel next submitted that the charge levelled against the appellant was different from the one for which he has been convicted. In any event the charge framed, according to the Counsel, was vague and it has caused him prejudice in his defence. Here again, we are unable to agree. In the complaint all the relevant facts were stated quite clearly and it was emphasised that the appellant had been found in possession of 16 pieces of gold with foreign markings ingeniously concealed inside long tubular pouches, in turn hidden inside a pillow case. He was stated to be guilty *inter alia* of offences punishable under rule 126-P (2). The second charge framed by the Court was as follows :

"That you on or about the 16th November, 1963, at about 12.45 hours at H.A.L. Aerodrome, Bangalore, alighted from the plane No. 105 which arrived from Bombay and when you and your articles were searched, you were found in possession of 16 pieces of gold each bearing markings as to its foreign origin and purity weighing 10 tolas each, having illegally imported into India in contravention of prohibition imposed by the Ministry of Finance, Notification No. 1211 F1/48, dated 25th August, 1948, and without permit issued by the Gold Control Authorities as required under rule 126-H (d) under the Defence of India (Amendment) Rules, 1963, and thereby committed an offence under rule 126-P (2) read with 126-I (10) of the Defence of India (Amendment) Rules, 1963, relating to Gold Control and within my cognizance."

The appellant never complained that this charge was vague or outside the complaint. Indeed in his statement in Court the appellant has admitted all the relevant facts alleged by the prosecution. The

facts alleged and proved clearly bring the appellant's case within the mischief of rules 126 (H) (2) (d) and 126 (P) (2). Rule 126-H (2) (d) has already been reproduced earlier. Under rule 126-P (2) (ii) whoever has in his possession or under his control any quantity of gold in contravention of any provision of Part XII-A is punishable with imprisonment for a term of not less than six months and not more than two years and also with fine. All the relevant salient facts alleged by the prosecution having been admitted by the appellant there can hardly be any question of prejudice having been caused to him by the wide language of the complaint and the charge assuming the language to be wide. This argument is accordingly repelled.

15 Lastly the Counsel contended that the sentence imposed was too severe. The entire gold seized from him having been confiscated the sentence undergone should, according to the submission, be held to serve the cause of justice. We have already noticed that under rule 126-P (2) (ii) the minimum period of imprisonment prescribed is six months. According to the appellant the law has since been amended and under the Gold (Control) Act (XVIII of 1965) which has repealed Part XII A of the Rules there is no minimum sentence of imprisonment prescribed. In our opinion this case must be governed by the law as it was prior to the enforcement of the Gold (Control) Act, 1965. Our attention has not been drawn to any provision of law nor to any principle or precedent which would attract the provisions of the Gold (Control) Act of 1965 to this case in regard to the question of sentence.

16 This appeal accordingly fails and is dismissed.

V K ————— Appeal dismissed

THE SUPREME COURT OF INDIA (Civil Appellate Jurisdiction)

PRESENT —J C Shah, K S Hegde and A N Grover, JJ

M/s D N Roy and S K Banerjee
and others

Appellants*

v

The State of Bihar and others

Respondents

Mines and Minerals (Regulation and Development) Act (LXVII of 1957), section 30—Exercise of suo moto power under—Necessity to give person affected opportunity to show cause

If the Central Government wanted to exercise its *suo moto* power under section 30 of the Mines and Minerals (Regulation and Development) Act, 1957, in order to pass the impugned order cancelling the grant of a mining lease by the State Government in favour of the appellant, it should have intimated that fact as well as the ground on which it proposed to exercise that power to the appellant and given him an opportunity to show cause against the exercise of *suo moto* power as well as against the grounds on which it wanted to exercise its power. But at no stage the appellant was informed that the Central Government proposed to exercise its *suo moto* power and asked him to show cause against the exercise of such a power. At all stages it purported to act under rules 54 and 55 of the Mineral Concession Rules 1960. The impugned order is therefore vitiated. [Para 7]

Appeal from the Judgment and Decree dated 9th August, 1966 of the Patna High Court in Misc Judicial Case No 1665 of 1964.

M C Chagla Senior Advocate (Miss Kailash Mehta and A K Nag Advocates, with him), for Appellants

Jagdish Swarup, Solicitor General of India (R C Prasad Advocate with him) for Respondents Nos 1, 3 and 4

Dr V A Seyid Muhammad Senior Advocate (S P Nayar Advocate with him) for Respondent No 2

* C.A. No 1908 of 1968

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The Judgment of the Court was delivered by

Hegde, J.—On 24th June, 1959, the Deputy Commissioner, Santal Parganas caused a notice dated 20th June, 1959, published in the Bihar Gazette, in accordance with the provisions of rule 67 of the Mineral Concession Rules, 1949, of the availability for re-grant of mining rights in respect of fire-clay over the whole of village Palasthali No. 39, situate in Thana Nala, Block Kasta, Sub-Division Jamtara in the District of Santal Parganas. He announced in that notice that the said area will be available for re-grant with effect from 1st August, 1959, and invited applications for grant of mining lease in respect of that area in accordance with the provisions of Mineral Concession Rules, 1949. The appellant, a partnership firm applied for that lease on 24th June, 1959, itself. Thereafter other persons including the 5th respondent Nankhu Singh also applied for obtaining the lease in question. The State Government of Bihar granted the lease to the appellant on 31st March, 1962. In pursuance of that grant a written agreement was entered into between the State Government and the appellant and the same was duly registered. The State Government rejected the applications of the other applicants. Even during the pendency of the applications before the State Government, the 5th respondent moved the Central Government under rule 54 of the Mineral Concession Rules, 1960 which had replaced the 1949 Rules. Therein he prayed that the grant of the lease in favour of the appellant, if it had been made, should be cancelled and that he should be granted the mineral lease in question. The Central Government served a copy of that petition on the appellant and called for its comments. At the same time it called for the comments of the State Government, as well. After receiving the comments of the State Government, the same were passed on to the appellant as well as to the 5th respondent and their further comments were called for. After examining the representation made by the parties and the comments offered by the State Government, the Central Government dismissed the petition made by the 5th respondent

on 30th September, 1964. The Order of the Central Government reads thus :

“ Government of India

Ministry of Steel and Mines

(Department of Mines and Metals)

No. MV-1 (569) /61.

New Delhi, the 30th September, 1964

From

Shri A. Nabar,

Under Secretary to the Government of India

To

Shri Nankhu Singh,

P. O. Churulia, Dist. Burdwan (West Bengal).

Subject : Application under rule 54 of the Mineral Concession Rules, 1960 in respect of Mining lease for fire-clay over 248 acres in Mouza Palasthali, P. S Nala, Distt. Santal Parganas.

Sir,

I am directed to refer to your application, dated 17th October, 1961 on the above subject and to say that after careful consideration the Central Government hereby reject your revision application as being time-barred.

Yours faithfully,

(Sd.) A. Nabar,

Under Secretary to the

Government of India.”

2. Thereafter the Central Government passed a further order on 5th November, 1964, and that order reads thus :

Registered A/D.

“ Government of India

Ministry of Steel and Mines.

(Department of Mines and Metals)

No. MV-1 (569)/61.

New Delhi, the 5th November, 1964.

From

Shri H. S Sahni,

Under Secretary to the Government of India

To

The Secretary to the Government of Bihar,
Department of Mines and Geology,
Patna.

Subject Revision application under rule 54 of the Mineral Concession Rules 1960 from Shri Nankoo Singh relating to Mining lease for fire clay over 248 acres in Santal Pargana District

Sir,

In continuation of this Ministry's letter of even number dated 30th September 1964, on the above subject I am directed to say that since no entry in the standard register was made as required under former rule 67 of the Mineral Concession Rules 1949, the area could not have been held to be available and the four applications (referred to in para 2 of the State Government's letter No. 3181/M dated 9th June 1962) would be deemed to be premature and should have been rejected on that ground alone

Even assuming that the notification was valid the first two applications were premature under rule 68 and on that ground should have been rejected. Apart from this the application of M/s D N Roy and S K Banerjee was deemed to be rejected on the expiry of 9 months from the date of receipt of application i.e. 24th March 1960. The party did not come up in revision. The application, therefore, ceased to exist and the order of the State Government granting the lease to this party on 31st March, 1962, was without jurisdiction. The grant and consequent execution of the Mining lease are therefore void.

In view of the position explained above the Central Government in exercise of their revisionary power conferred by rule 55 of Mineral Concession Rules 1960 and all the other powers enabling in this behalf hereby set aside the order of the State Government contained in their letter No. A/MM/4031/62 1789M dated 31st March 1962 (mentioned in State Government's letter No. A/MM 4031/62 3181/M dated 9th June 1962) granting mining lease to M/s D N Roy and S K Banerjee and further direct them to throw open the area again under rule 58 (1) of Mineral Concession Rules, 1960 for re grant.

The notification should clearly indicate the date from which the area could be available for re grant and the date by which the petitioners should submit their applications for mineral concession.

4 M/s D N Roy and S K Banerjee are being informed

Yours faithfully,

(Sd) H Sahni

Under Secretary to the
Government of India

Copy forwarded to M/s D N Roy and S K Banerjee Village and P O Churulia District Burdwan (West Bengal) with reference to their letter, dated 12th June 1963

(Sd) H S Sahni,

Under Secretary to the
Government of India

3 Aggrieved by this order the appellant moved the Patna High Court under Article 226 of the Constitution to quash the order of the Central Government, dated 5th November 1964 (which will hereinafter be referred to as the impugned order). The High Court dismissed its petition. As against the order of the High Court the appellant has brought this appeal after obtaining certificate of fitness from the High Court.

4 It was urged before the High Court that the Government having passed the final order on 30th September 1964 it had no power to review its own order and make any further order. Admittedly there is no provision under the Mines and Minerals (Regulation and Development) Act 1957 or under the Mineral Concession Rules 1960 empowering the Central Government to review its order. The High Court did not hold that the Central Government had any power to review its own order either under the Mines and Minerals (Regulation and Development) Act 1957 or under the Mineral Concession Rules. It upheld the Central Government's order on two grounds namely that the order dated 30th September, 1964 is not a complete order as it did not dispose of the application made by the 5th respondent.

dent completely and secondly the Central Government had *suo moto* power to review the order of the State Government under section 30 of the Mines and Minerals (Regulation and Development) Act, 1957. These conclusions of the High Court were assailed before us.

5. In his application under rule 54 of the Mineral Concession Rules, 1960, the 5th respondent prayed for (i) setting aside the grant made in favour of the appellant and (ii) grant the area in question on lease to him. The High Court thought that these are two independent prayers. In its view the Central Government by its order, dated 30th September, 1964, had disposed of only the prayer of the 5th respondent to grant the area on lease to him but it had not disposed of his first prayer, namely, to cancel the grant in favour of the appellant. In our opinion this is an incorrect approach. The two reliefs asked for by the 5th respondent were inter-connected reliefs. In the context in which they were made, they cannot be considered as independent prayers. No grant in his favour could have been made without first setting aside the grant made in favour of the appellant. Therefore the first relief asked for by the 5th respondent is a necessary condition precedent for a grant in his favour. Further by its order dated 30th September, 1964, the Central Government dismissed the entire application of the 5th respondent on the grounds that the same was time-barred. If his application in respect of one part of his prayer was time-barred, it was equally time-barred in respect of the other part.

6. The impugned order of the Central Government does not show that it was made in the exercise of its *suo moto* power. It is purported to have been made on the basis of the application made by the 5th respondent under rule 54 of the Mineral Concession Rules, 1960. In paragraph 3 of that order it says "in view of the position explained above the Central Government in exercise of their revisionary power conferred by rule 55 of Mineral Concession Rules, 1960 and all other powers enabling in this behalf hereby set aside the order of the State Government contained in their letter No. A/MM/4031/62-1789 M dated 31st March, 1962."

7. It is true that the order in question also refers to "all other powers enabling

in this behalf." But in its return to the writ petition the Central Government did not plead that the impugned order was passed in exercise of its *suo moto* powers. It is true that if the exercise of a power can be traced to an existing power even though that power was not purported to have been exercised, under certain circumstances, the exercise of the power can be upheld on the strength of an undisclosed but undoubted power. But in this case the difficulty is that at no stage the Central Government intimated to the appellant that it was exercising its *suo moto* power. At all stages it purported to act under rules 54 and 55 of the Mineral Concession Rules, 1960. If the Central Government wanted to exercise its *suo moto* power it should have intimated that fact as well as the grounds on which it proposed to exercise that power to the appellant and given him an opportunity to show cause against the exercise of *suo moto* power as well as against the grounds on which it wanted to exercise its power. Quite clearly the Central Government had not given him that opportunity. The High Court thought that as the Central Government had not only intimated to the appellant the grounds mentioned in the application made by the 5th respondent but also the comments of the State Government, the appellant had adequate opportunity to put forward his case. This conclusion in our judgment is untenable. At no stage the appellant was informed that the Central Government proposed to exercise its *suo moto* power and asked him to show cause against the exercise of such a power. Failure of the Central Government to do so, in our opinion vitiates the impugned order.

8. For the reasons mentioned above we allow this appeal as well the writ petition and set aside the impugned order. Central Government shall pay the costs of the appellant in this Court as well as in the High Court.

V.K.

Appeal allowed.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —J C Shahi G K Mitter, K S Hegde, A N Grover and A N Ray, JJ
Khajamian Wakf Estates etc

Appellants*

v

The State of Madras etc

Respondents

Madras Inam Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1963)—Madras Leaseholds (Abolition and Conversion into Ryotwari) Act (XXVII of 1963)—Madras Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of 1963)—Validity—Constitution of India (1950), Articles 21 31 (2) and 31-A

The impugned Acts viz the Madras Inam Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1963) the Madras Leaseholds (Abolition and Conversion into Ryotwari) Act (XXVII of 1963) and the Madras Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of 1963) are laws providing for the acquisition by the State of "estate" as contemplated by Article 31-A of the Constitution. They seek to abolish all intermediate holders and to establish direct relationship between the Government and the occupants of the concerned lands. These legislations were undertaken as part of agrarian reform. Hence the provisions relating to acquisition or the extinguishment of the rights of the intermediate holders fall within the protective wings of Article 31-A of the Constitution, and cannot be challenged on the ground that they are violative of Articles 14 19 or 31 of the Constitution. [Para 6]

The provisions in the impugned Acts reducing the liability of the tenants in the matter of payment of the arrears of rent, whether decreed or not is not beyond the legislative competence of the State Legislature. Those arrears are either arrears of rent or debts due from agriculturists. If they are treated as arrears

of rent then the State Legislature had legislative power to legislate in respect of the same under Entry 18 of List II of the Seventh Schedule to the Constitution. If they are considered as debts due from the agriculturists then the State Legislature had competence to legislate in respect of the same under Entry 30 of the same List. [Para 10]

In regard to the inams belonging to the religious and charitable institutions, the impugned Acts do not provide for payment of compensation in a lumpsum but on the other hand provision is made to pay them a portion of the compensation every year as Tasdik. This is only a mode of payment of the compensation. The method adopted is not violative of Article 31 (2) of the Constitution. At any rate that provisions is protected by Article 31 A of the Constitution.

[Para 11]

The contention that by acquiring the properties belonging to religious denominations the Legislature violated Article 26 (c) and (d) of the Constitution, is untenable. These provisions do not take away the right of the State to acquire property belonging to religious denominations. These denominations can own acquire properties and administer them in accordance with law. That does not mean that the property owned by them cannot be acquired. [Para 12]

Appeals from the Judgments and Orders dated the 24th June, 1966 and 20th July, 1966 of the Madras High Court in Writ Petitions Nos 1542 of 1965 etc, etc

V Vedantachari K. C. Rajappa S Balakrishnan and Dr N M Ghatate, Advocates, for Appellants (In C As Nos. 2480 to 2482, 2484 to 2509, 2575 and 2576 of 1966)

V Vedantachari and S Balakrishnan, Advocates for Appellants, (In C As Nos 2543, 2544 and 2546 of 1966)

S Balakrishnan and Dr N M Ghatate, Advocates for Appellant (In C A No 2545 of 1966)

S I Gupte Senior Advocate (K Jayaram Advocate with him) for Appellants (In C As Nos 2547 to 2553 and 2559 of 1966)

K Parasuram K R Chaudhuri and K Rajendra Chaudhuri, Advocates for Appellants (In C As Nos 2602 of 1966 214 to 217 and 1055 of 1967)

* C. As Nos 2480 to 2509 2543 to 2546 2547 to 2553 2559 2575 2576 and 2602 of 1966 214 to 217 672 to 674 1053 1054 1055 1062, 1063 1457 and 1458 of 1967 and 162, 672, 673 and 1000 of 1968

M. S. K. Sastri, S. Gopalan and M. S. Narasimhan, Advocates, for Appellants (In C.As. Nos 672 to 674 of 1967).

M. S. Narasimhan, Advocate, for Appellants (In C. As. Nos. 1053 and 1054 of 1967).

A. V. V. Nair, Advocate, for Appellants (In C.As. Nos. 1062 and 1063 of 1967).

V. Vedantachari, A. T. M. Sampath and E. C. Agrawala, Advocates, for Appellants (In C. As. Nos. 1457 and 1458 of 1967).

P. C. Bhartari, Advocate and *J.B. Dadachanji & Co.*, Advocates, for Appellant (In C.A. No. 162 of 1968).

K. Jayaram, Advocate for *R. Thiagarajan*, Advocate, for Appellants (In C. As Nos. 672, 673 and 1000 of 1968 and 2483 of 1966).

S. Mohan Kumaramangalam, Senior Advocate, (*A.V. Rangam*, Advocate, with him), for Respondent (In all the Appeals)

R. Kunchitapadam, Vinnet Kumar and K Jayaram, Advocates, for Respondent No. 2 (In C.A.No. 2484 of 1966)

M. K. Ramamurthi Senior Advocate, (*J. Ramamurthy and Vineet Kumar*, Advocates, with him), for Respondent No. 2 (In C. As. Nos. 2488 to 2490 of 1966).

The Judgment of the Court was delivered by

Hegde, J.—In this batch of appeals, the validity of the Madras Inam Estates (Abolition and Conversion into Ryotwari) Act, 1963 (Madras Act XXVI of 1963), the Madras Lease-holds (Abolition and Conversion into Ryotwari) Act, 1963, Madras Act (XXVII of 1963) and the Madras Minor Inams (Abolition and Conversion into Ryotwari) Act, 1963 (Madras Act XXX of 1963) is challenged on the ground that the material provisions in those Acts are violative of Articles 14, 19 (1) (f) and 31 of the Constitution. The provisions in these Acts reducing the tenants liability to pay the arrears of rent are also challenged on the ground that the Legislature had no competence to enact those provisions. A few other minor contentions are also raised in these appeals to which reference will be made in the

course of the judgment. All these contentions had been unsuccessfully urged before the High Court. Dealing with the allegation of infringement of Articles 14, 19 and 31, the High Court in addition to holding that there has been no infringement of those Articles has further held that the challenge to the validity of these Acts on the basis of those Articles is precluded in view of Article 31 (A). Dealing with the contention relating to the reduction of rent the High Court came to the conclusion that the Legislature had power to enact the impugned provisions. The High Court also has given reasons for rejecting the other contentions advanced before it. Aggrieved by the decision of the High Court these appeals have been brought by Special Leave.

2. The impugned statutes deal with agrarian reforms. They purport to deal with inam lands. It is profitless to go to the origin of inams or about their early history. Suffice it to say that the Urdu word "Inam" means a gift. The inams grants were made by the Rulers for various purposes. Some of them were granted to institutions and some to individuals. Broadly speaking there were three types of inams. The first type consisted of the grant of the *melwaram* right alone. The second category consisted of the grant of both the *melwaram* as well as the *kudwaram* right. In addition to these two inams, there were what are known as Minor Inams. Sometime prior to 1862, the Government took up the question of enfranchising the inams. The Inams Commissioner went into the rights of various persons claiming to be Inamdars. Thereafter the Madras Enfranchised Inams Act, 1862 (Madras Act IV of 1862) was passed for declaring and confirming the title of the Inamdars. Section 2 of that Act provided that the title deeds issued by the Inams Commissioner or an authenticated extract from the register of the Commissioner or Collector shall be deemed sufficient proof of the enfranchisement of land previously held on inam tenure. By Madras Inams (Assessment) Act, 1956 (Madras Act XL of 1956), full assessment was levied on all inams lands except *melwaram* inams granted on service tenure, without affecting in any way the rights as between the

Inamdar and other persons if any, in possession or enjoyment of the inam land

3 Where the inam comprised the entire village the same was treated as an estate in the Madras Proprietary Estates' Village Service Act 1894 (Madras Act II of 1894) and the Madras Hereditary Village Offices Act 1895 (Madras Act III of 1895) as well as in Madras Estates Land Act 1908 (Madras Act I of 1908) Madras Estates Land Act 1908 recognised the ryots permanent tenure. That Act secured a permanent right of occupancy to every ryot who at the commencement was in possession of ryoti land or who was subsequently admitted to the possession of such land. Then came the Madras Estates Land (Third Amendment Act) 1936 (Madras Act XVIII of 1936). That Act amplified the definition of the 'estate' in the Madras Estates Land Act 1908 so as to bring within its scope all inam villages of which the grant was made confirmed or recognised by the Government. It also provided that when a question arises whether any land was the land holder's private land or not the land should be presumed not to be Inamdar's private land until the contrary was proved. In 1937 the Madras Government appointed the Prakasam Committee to enquire into and report the conditions which prevailed in the Zamindari and other proprietary areas in the State. That committee submitted its report together with a draft bill on the lines of its recommendations but no action was taken on that report as the Congress Ministry which appointed it resigned. Then we come to the Madras Estates (Abolition and Conversion into Ryotwari) Act 1948 (Madras Act XXVI of 1948). This Act applies to all estates *i.e.* Zamindari and undertenure estate and all inam villages in which the grant consisted of *melucram* alone. The Act as its preamble says is an Act to provide for the repeal of the permanent settlements, the acquisition of the rights of landholders in permanently settled and certain other estates in the Province of Madras and the introduction of the ryotwari settlement in such estates. To complete the agrarian reform initiated by this Act the impugned Acts appear to have been enacted. The Preamble to Madras Act XXVI of 1963 says that it is an Act to provide for the acquisition of all rights of landholders

in inam estates in the State of Madras and the introduction of the ryotwari settlement in such estates. That Act follows by and large the provisions in Act XXVI of 1948. In Act XXVI of 1963 inams estates are divided into two categories namely (1) existing inam estate and (2) a new inam estate. The existing inam estate refers to the estate consisting of the whole village and the new inam estate means a part village inam estate of Pudukkottai inam estate. The "New Inam estate" was not an estate known to law earlier. It is merely a name given to part village inam estate or a Pudukkottai Inam estate for drafting convenience. Act XXVII of 1963 is an Act to provide for the termination of the leases of certain lease holds granted by the Government, the acquisition of the rights of the lessees in such lease holds, and the introduction of the ryotwari settlement in such leaseholds. Act XXX of 1963 is an Act to provide for the acquisition of the rights of the Inamdars in minor inams and the introduction of the ryotwari settlement in such inams.

4 We do not think it necessary to go into the contention that one or more provisions of the impugned Acts are violative of Articles 14, 19 and 31, as in our opinion these Acts are completely protected by Article 31 (A) of the Constitution which says that

'Notwithstanding anything contained in Article 13 no law providing for—

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31'

5 The expression 'estate' is defined in sub Article (2) of Article 31 (A). That definition includes not merely inams but also land held under ryotwari settlement as well as land held or let for the purpose of agriculture or for purposes ancillary thereto including waste land, forest land, land for pastures or site or buildings and other structures occupied by the cultivators of land, agriculturists and village artisans,

6. The impugned Acts are laws providing for the acquisition by the State of "estate" as contemplated by Article 31 (A). They seek to abolish all intermediate holders and to establish direct relationship between the Government and the occupants of the concerned lands. These legislations were undertaken as a part of agrarian reform. Hence the provisions relating to acquisition or the extinguishment of the rights of the intermediate holders fall within the protective wings of Article 31 (A)—See *B. Shankara Rao Badami and others v. State of Mysore and another*¹.

7. It is next contended on behalf of the appellants that the lands on which full assessment was levied under Act XL of 1956 ceased to be inams and therefore provisions of the Madras Act XXVI of 1963 cannot be applied to the same. We have not thought it necessary to go into the question whether as a result of Madras Act XL of 1956, certain inams have ceased to be inams, as in our opinion, 'whether they continued to be inams or not they are still "estate" within the meaning of Article 31 (A) because they fall either under sub-classes (I) or (II) or (III) of Clause (a) of Article 31 (A) (2) and that being so the provisions of the impugned Acts cannot be challenged on the ground that they infringe Articles 14, 19 and 31. The contention that as the State purported to abolish inams and not other intermediaries the law cannot be held to be valid if the intermediaries sought to be removed are not Inamdars is an untenable one. If the impugned legislation can be traced to a valid legislative power, the fact that the Legislature wrongly described some of the intermediaries sought to be removed does not make the law invalid. From the above observations, it should not be understood that we have come to the conclusion that the intermediaries concerned were not Inamdars. We have not gone into that question. From the provisions of the Impugned Acts, it is quite clear that the intention of the legislature was to abolish all intermediaries including the owners of those "estates" that were subjected to full assessment by Act XL of 1956.

8. It was next urged that Article 31 (A) does not protect a legislation where no

compensation whatsoever has been provided for taking the "estates". We do not think we need go into that question. This contention bears only on the provisions of the Madras Act XXIV of 1963. Section 18 of that Act provides that compensation shall be determined for each inam as a whole and not separately for each of the interests in the inams. The validity of this section was not challenged before us. All that was urged was that for some of the properties included in the inam, no compensation was provided. Even if we assume this contention to be correct, it cannot be said that no compensation was provided for the acquisition of the inam as a whole. Hence Article 31 (A) bars the plea that there was contravention of Article 31 (2) in making the acquisition in question. One of the contentions taken on behalf of the appellants is that the impugned Acts to the extent they purport to acquire mining lands are outside the purview of Article 31 (A). It is not known whether the lands in which mining operations are going on were let or held as "estates". There is also no evidence to show that the owners of those lands are entitled to the mines. Hence it is not possible to uphold the contention that lands concerned in some of the appeals have been acquired without paying compensation.

9. In order to avoid the bar of Article 31 (A), a curious plea was put forward. It was urged that when the concerned bills were submitted to the President for his assent as required by the first proviso to Article 31 (A), the President was not made aware of the implications of the bills. This contention is a wholly untenable one. There is no material before us from which we could conclude that the President or his advisers were unaware of the implications of those bills. We must proceed on the basis that the President had given his assent to those bills after duly considering the implication of the provisions contained therein.

10. It was next urged that the provisions in the impugned Acts reducing the liability of the tenants in the matter of payment of the arrears of rent, whether decreed or not was beyond the legislative competence of the State Legislature. This contention is again untenable. Those arrears are either

1. (1969) 3 S.C.R. 1: (1969) 1 S.C.J. 854.

arrears of rent or debts due from agriculturists. If they are treated as arrears of rent then the State Legislature had legislative power to legislate in respect of the same under Entry 18 of List II of the VII Schedule. If they are considered as debts due from the agriculturists then the State Legislature had competence to legislate in respect of the same under Entry 30 of the same list.

11 In regard to the inams belonging to the religious and charitable institutions, the impugned Acts do not provide for payment of compensation in a lump-sum but on the other hand provision is made to pay them a portion of the compensation every year as Tasdik. This is only a mode of payment of the compensation. That mode was evidently adopted in the interest of the concerned institutions. We are unable to agree that the method adopted is violative of Article 31 (2). At any rate that provision is protected by Article 31 A.

12 It was next urged that by acquiring the properties belonging to religious denominations, the Legislature violated Article 26 (c) and (d) which provide that religious denominations shall have the right to own and acquire movable and immovable property and administer such property in accordance with law. These provisions do not take away the right of the State to acquire property belonging to religious denominations. Those denominations can own, acquire properties and administer them in accordance with law. That does not mean that the property owned by them cannot be acquired. As a result of acquisition they cease to own that property. Thereafter their right to administer that property ceases because it is no longer their property. Article 26 does not interfere with the right of the State to acquire property.

13 Mr S V Gupte appearing for some of the appellants urged that the impugned Act contravenes the second proviso to Article 31 (A). From the material before us it is not possible to hold that any property under the personal cultivation of any of the appellants had been acquired. Further there is no material to show what ceiling is? Hence it is not possible for us to examine the correctness of that contention. If in any particular case, the

second proviso to Article 31 (A) has been reached, then to that extent, the acquisition will become invalid.

14 It was urged by Mr Saxtri appearing for some of the appellants that the impugned Acts do not acquire the lands concerned in some of the appeals. This contention was not gone into by the High Court. Dealing with that contention, the High Court in its judgment observed

"But the applicability of the impugned Acts to their inams in question cannot be conveniently investigated in the present writ proceedings. The question will have to be determined with reference to the terms of the grant, the extent of the grant has to be ascertained by reference to the relevant materials. Section 5 of Madras Act XXXI of 1963 (XXIX of 1963¹) makes special provision for determination of the question whether any non ryotwari area is or is not 'an existing Inam Estate' or 'part village Inam Estate' or a minor inam or whole inam village in Pudukkottai. It is stated at the bar that in most of the cases now before us the parties have applied under the provisions of the said Act for determination of the character of the inams respectively held by them. It is needless to point out that the Tribunal constituted under the act will be entitled to decide that a particular property is neither an 'existing inam estate' nor a 'part village inam estate' nor a whole inam village in Pudukkottai and completely out of the coverage of Acts XXVI and XXX of 1963. We also make it clear that the disposal of these writ petitions now does not preclude the Inamdars from agitating the question that a particular property is not an inam at all and does not under any of the aforesaid four categories or falls under one or other of the categories as may be urged for the inamdars."

15 We agree with the High Court that the contention in question can be more appropriately gone into in the manner suggested by the High Court.

16 In the result these appeals fail and they are dismissed. But under the circumstances, we make no order as to costs in these appeals.

V K.

———— Appeals dismissed

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*J. C. Shah, G. K. Mitter, K. S. Hegde, A. N. Grover and A. N. Ray, JJ.*

Estate of Late Rangalal Jajodia

... Appellant*

v.

Commissioner of Income-tax, Madras

... Respondent.

Income-tax Act (XI of 1922), sections 24-B (3), 34 (3) second proviso—Reassessment—Limitation—Assessee dying after filing returns and producing documents but before assessment—Will—Wife appointed executrix and son disinherited—Notice to son and assessment made on estate represented by son, widow and her children—Assessment set aside on appeal by son with direction to make fresh assessment on executrix—Fresh assessment on executrix—Whether barred by limitation—Lack of notice to executrix before original assessment—Effect.

R filed income-tax returns for the years 1942-43 and 1943-44 as well as his excess profits tax returns for the corresponding chargeable accounting periods. On receipt of the returns, the officer issued the requisite statutory notices to *R* for production of accounts and also other evidence in support of the returns and *R* complied with the aforesaid notices. But before the assessments to income-tax and excess profits tax could be made *R* died on 11th January, 1946. *R* was survived by *S* son by a predeceased wife, *A*, the second wife and children by the second wife. *R* had made a will on 16th April, 1945 whereby *A* and one *B* were executrix and executor respectively. *S* was disinherited under the will. *S* however performed the funeral obsequies for the deceased. The Revenue on the basis of that information issued notice to *S* asking him to show cause why the assessment of the deceased should not be made on him as the legal representative. *S* objected to the course stating that he was not the legal representative and that *A* and *B* as the executrix and executor

respectively were the proper persons on whom proceedings were to be taken. The Revenue called for a copy of the will which however was not produced. The assessment was completed on 28th February, 1947, on the materials describing the assessee as "the estate of late *R* by legal heirs and representatives, *S* son of *R*, *A*, wife of *R* and her children". *S* appealed to the Appellate Assistant Commissioner and at the hearing of the appeal *S* produced a copy of the will. The Appellate Assistant Commissioner set aside the assessment and directed the Revenue Officer to make a fresh assessment on the executors in accordance with section 24-B of the Act. Pursuant to the direction the Revenue Officer gave notice to *A* and *B*. *B* who had refused to act as an executor intimated the fact to the Revenue Officer. *A*, the executrix, accepted the notice but requested the Revenue Officer to furnish her with copies of the returns, notes of examination and correspondence between the deceased and the Revenue to enable her to make representations. The Revenue Officer however took the view that under section 24-B the Act it was not necessary to go through all the formalities once again and completed the assessments on the estate of late *R* by executors *A* and another. The assessments were made on 29th October, 1952 more than four years after the end of assessment years 1942-43 and 1943-44 respectively. *A* appealed to the Appellate Assistant Commissioner who held that the assessments were validly made on a valid direction by the previous Appellate Assistant Commissioner. He however set aside the assessments directing the Revenue Officer to complete them after giving the executrix a fresh opportunity to object to the assessment. On further appeal the Tribunal held that the re-assessment made by the Revenue Officer on *A*, the executrix, was valid and that the assessments were saved from the bar of limitation by the second proviso to section 34 (3) of the Act. The Tribunal also held that the assessments were validly made under section 24-B (3) of the Act. The High Court on reference held that the direction and finding of the Appellate Assistant Commissioner were outside the scope of the second proviso to section 34 (3) and the assessment proceedings were barred by limitation. The High Court

*C.As. Nos. 2332 to 2335 and 2336 to 2339 of 1966. 19th November, 1970.

further held that section 24 (3) applied to the assessments and the procedure prescribed for making the assessment on the deceased assessee was to be repeated as regards the assessments on the legal representative irrespective of the fact that such procedure was followed during the life time of the deceased. On appeal to the Supreme Court

Held that the expression "any person" in the setting in which it appears must be confined to a person intimately connected with the assessments of the year under appeal. In the present appeals the finding was that the assessment was made on *A* but no notice was given to her. The necessary direction was therefore given that notice should be given to her. *A* was heard and the assessment was made. She was not merely intimately connected with the assessment. She was in fact an assessee. Therefore the second proviso to section 34 (3) applied. This second proviso to section 34 (3) of the Act applied to the present appeals because first the proceedings against *R* commenced on filing of returns before the Income tax authorities, secondly the assessment proceeding continued after the death of *R* against the legal representatives *S* and *A*, thirdly, the assessment proceedings on being set aside and not cancelled pursuant to the appeal filed by *S* on the ground that notice was not given to *A* were continued and fourthly, the setting aside of the assessment was only on the ground that notice was not given to *A* and therefore the finding and direction was vital to the assessment proceedings. The High Court was in error in holding that the assessment proceedings were barred by limitation. The lack of a notice did not amount to the Revenue Authority having had no jurisdiction to assess but that the assessment was defective by reason of notice not having been given to her. An assessment proceeding does not cease to be a proceeding under the Act merely by reason of want of notice. It will be a proceeding liable to be challenged and corrected. Similarly if there is a mistake as to name or there is a misdescription of the name the proceeding will be liable to be challenged and corrected by giving notice to the assessee subject to such just exceptions as an assessee can take under law. The direction given by the Appellate Assistant Commissioner was to

make fresh assessment on *A* in accordance with the provisions of the Act

[Para 15, 16 and 13]

Section 24 B covered the entire field of procedure to be followed in assessing the income of the deceased person and section 24 (3) applied to the present case. The High Court correctly held that section 24 B of the Act applied to the present case. [Para 17]

Appeals from the Judgment and Order, dated the 16th August, 1965, of the Madras High Court in Tax Case No 171 of 1962 (Reference No 96 of 1962)

A K Sen Senior Advocate (*T A Ramachandran* Advocate with him) for Appellant (In C As Nos 2332 to 2335 of 1966) and Respondent (In C As Nos 2336 to 2339 of 1966)

S Mitra Senior Advocate (*G C Sharma*, Advocate and *B D Sharma* Advocate for *R N Sachthy* Advocate, with him), for Respondent (In C As Nos 2332 to 2335 of 1966) and Appellant (In C As Nos 2336 to 2339 of 1966)

The Judgment of the Court was delivered by

Ray, J—These appeals are by certificate against the judgment dated 16th August, 1965 of the High Court of Madras on a reference under section 66 (1) of the Indian Income tax Act, 1922 (hereinafter referred to as the Act)

2 Seven questions were referred to the High Court. The reference involved first the construction of the second proviso to sub-section (3) of section 34 of the Act and secondly the applicability of section 24-B (3) of the Act to the assessments made on the executor to the estate of late Ranganal Jajodia

3 In order to appreciate the scope of the reference it is necessary to refer to the facts which gave rise to the questions. Ranganal Jajodia (hereinafter referred to as the deceased) filed income tax returns for the years 1942-43 and 1943-44 as well as his excess profits tax returns for the corresponding chargeable accounting periods ending 31st December, 1941 and 31st December 1942 before the Income-tax Officer, Excess Profits Tax Officer, Madras Special South Circle. On receipt of the returns, the officer issued the requi-

site statutory notices to the assessee for production of accounts and also other evidence in support of the returns under sections 22 (4) and 23 (2) of the Act and under the corresponding provisions of section 30 of the Excess Profits Tax Act, 1940. Rangalal Jajodia complied with the aforesaid notices. But before the assessments to the income-tax and excess profits tax could be made Rangalal Jajodia died on 11th January, 1946.

4. Rangalal Jajodia was survived by Shankar Lal Jajodia son by a predeceased wife, Aruna Devi, the second wife and children by the second wife. Rangalal Jajodia had made a will on 16th April, 1945 whereby Aruna Devi and one Ram Kumar Bhuwarka were executrix and executor respectively. Shankar Lal Jajodia was disinherited under the will. Shankarlal Jajodia however performed the funeral obsequies for the deceased. The Revenue on the basis of that information issued notice to Shankarlal Jajodia asking him to show cause why the assessment of the deceased should not be made on him as the legal representative. Shankarlal Jajodia objected to the course stating that he was not the legal representative and that his step mother Aruna Devi and Ram Kumar Bhuwarka as the executrix and executor respectively were the proper persons on whom proceedings were to be taken. The Revenue called for a copy of the will which however was not produced. The assessment was completed on 28th February, 1947 on the materials describing the assessee as "the estate of late Shri Rangalal Jajodia by legal heirs and representatives, Shri Shankarlal Jajodia, son of Rangalal Jajodia, Shrimati Aruna Devi, wife of Rangalal Jajodia and her children."

5. The assessment orders were served on Shankarlal Jajodia who appealed to the Appellate Assistant Commissioner contending that he was not the legal representative. At the hearing of the appeals on 30th April, 1952 Shankarlal Jajodia produced a copy of the will. The Appellate Assistant Commissioner set aside the assessment and directed the Revenue Officer to make a fresh assessment on the executors in accordance with section 24-B of the Act. Pursuant to the direction of the Appellate Assistant Commissioner the Revenue Officer informed the executrix

and Ram Kumar Bhuwarka of his proposal to make assessment on them as the legal representatives of Rangalal Jajodia. Ram Kumar Bhuwarka who had refused to act as an executor intimated the fact to the Revenue Officer. Aruna Devi the executrix accepted the notice but requested the Revenue Officer to furnish her with copies of the returns, notes of examination and correspondence between the deceased and the Revenue to enable her to make representations. The Revenue Officer however took the view that under section 24-B of the Act it was not necessary to go through all the formalities once again and that the assessments were required to be done only for the purpose of inviting objections, if any, to the *locus standi* of Aruna Devi as the legal representative of the deceased. On the said view the Revenue Officer completed the income-tax and excess profits tax assessments on the estate of late Rangalal Jajodia by executors Mrs. Aruna Devi and another. The assessments were made on 29th October, 1952 more than four years after the end of assessment years 1942-43 and 1943-44 respectively.

6. The executrix Aruna Devi appealed against the assessments contending before the Appellate Assistant Commissioner that the assessments were barred by limitation and that the previous Appellate Assistant Commissioner's direction to make assessments on her was invalid. It was also contended that reasonable opportunities were not given to Aruna Devi before the assessments were made. The Appellate Assistant Commissioner on 16th April, 1955 held that the assessments were validly made on a valid direction by the previous Appellate Assistant Commissioner. He however set aside the assessments directing the Revenue Officer to complete them after giving the executrix a fresh opportunity to object to the assessment. Aruna Devi appealed to the Appellate Tribunal. The Tribunal rejected the appeals on the ground that the assessments had been set aside by the Appellate Assistant Commissioner with the direction to give sufficient opportunities to her. On a reference taken by Aruna Devi to the High Court, the High Court held that the Tribunal ought to have properly disposed of the appeals on all the contentions raised therein. Pursuant to

the order of the High Court the Tribunal heard the appeals on merits on 9th June, 1961 and held that the re assessment made by the Revenue Officer on Aruna Devi, the executrix, was valid and that the assessments were saved from the bar of limitation by the second proviso to section 34 (3) of the Act. The Tribunal also held that the assessments were validly made under section 24-B (3) of the Act.

7 The High Court on reference under section 66 (1) of the Act held that the second proviso to section 34 (3) applied to save re assessment from the bar of limitation but that in the present appeals the first assessments which were made on Shankarlal Jajodia were set aside on appeal because these were not made on the real legal representatives of the deceased and therefore no direction or finding could be made by the Revenue Authority in any such appeal as would remove the bar of limitation on the re assessment later made on the executor who was to be regarded as an entirely different assessee. The High Court also held that the direction or finding given by the Appellate Assistant Commissioner for making the assessment on the executors was unnecessary for the disposal of the appeals filed by Shankarlal Jajodia and therefore the direction and the findings were outside the scope of the proviso to section 34 (3) of the Act.

8 As to section 24-B sub-clause (3) of the Act the High Court held that the section applied to the assessments in the present appeals but the High Court negatived the contention of the Revenue that the assessments made on the executrix were made in proper compliance with the procedure prescribed under section 24-B (3) of the Act. The High Court held that it was a condition precedent to the validity of assessment to be made on the legal representatives that the procedure prescribed for making the assessment on the deceased assessee was to be repeated as regards the assessment on the legal representative irrespective of the fact that such procedure was followed during the life time of the deceased.

9 The relevant provisions of section 34 (3) of the Act necessary for the purpose of the present appeals are the second proviso to the said sub-section. The said second proviso is as follows —

Provided further that nothing contained in this section limiting the time within which any action may be taken or any order assessment or re-assessment may be made shall apply to a re assessment made under section 27 or to an assessment or re-assessment made on the assessee or any person in consequence or of to give effect to any finding or direction contained in an order under sections 31 33 33 A, 33-B and 66 or 66-A."

10 Counsel for the Revenue in C As Nos 2336-2339 of 1966 contended that the second proviso saved the assessment from the bar of limitation by reason of an order of assessment having been made in consequence of a finding or direction given by the Appellate Assistant Commissioner and secondly that Aruna Devi was a person intimately connected with the assessment and that in fact the assessment was made on her but the assessment was set aside because no notice was given to her. Counsel for the appellant Aruna Devi in C As Nos 2332-2335 of 1966 on the other contended first that Aruna Devi was not an assessee and therefore the benefit of the second proviso to section 34 (3) of the Act would not avail. Secondly, it was said that Aruna Devi was not intimately connected with the assessment and was not an assessee, because there was no proceeding in law under the Act against Aruna Devi and therefore she was not an assessee.

11 An assessee is defined in section 2 (2) of the Act meaning a person by whom income-tax or any other sum of money is payable under this Act and includes every person in respect of whom any proceeding under the Act has been taken for the assessment of his income or of the loss sustained by him or of the amount of refund due to him. It was said on behalf of the appellant Aruna Devi that the estate cannot be an assessee and in order to make the legal representative an assessee a proceeding must be taken against the executor under the Act. It was also said that in the final assessment Aruna Devi was assessed as an executrix but no proceeding for assessment was taken against Aruna Devi as an executrix. Emphasis was placed on the fact that the proceedings were against the estate which was unknown to law and even if the proceeding against the estate could be held to be a valid proceeding Aruna Devi was never given any notice and therefore no proceeding was taken against her.

12. The assessment order shows the name of the assessee as the estate of late Shri Rangalal Jajodia by legal heirs and representatives Shri Shankarlal Jajodia son of Shri Rangalal Jajodia, Smt. Aruna Devi wife of Rangalal Jajodia and her children. Rangalal Jajodia had filed the return. He died before the assessment was completed. The assessment was made on Aruna Devi as legal representative. She was described as legal representative but not as an executrix. The liability under the Act in case of death of a person is of the executor, administrator or legal representative to be liable to pay out of the estate of the deceased person to the extent to which the estate is capable of meeting the charge the tax assessed as payable by such person or any tax which would have been paid by him under the Act if he had not died. The Revenue in the assessment proceedings described the estate of Rangalal Jajodia by the legal heirs and representatives. It cannot be denied that an executor is also a legal representative.

13. What happened in the present assessment proceedings was that the proceedings were commenced during the life-time of Rangalal Jajodia by reason of the returns being filed by and notices under sections 22 (3) and 23 (2) of the Act having been served on Rangalal Jajodia during his life-time. The assessment order contains intrinsic evidence to that effect as also of repeated intimation having been given to Shankarlal Jajodia after the death of Rangalal Jajodia. No reply having been received from Shankarlal Jajodia, the assessment was completed under section 24-B of the Act through the legal heirs and representatives including Aruna Devi. The Appellate Assistant Commissioner on an appeal preferred by Shankarlal Jajodia set aside the assessment because no notice was given to Aruna Devi though the assessment proceeding was against her as a legal representative. The lack of a notice does not amount to the Revenue Authority having had no jurisdiction to assess but that the assessment was defective by reason of notice not having been given to her. An assessment proceeding does not cease to be a proceeding under the Act merely by reason of want of notice. It will be a proceeding liable to be challenged and corrected. Similarly, if there is a mistake as to name or there is a misdescription of the name, the proceeding will

be liable to be challenged and corrected by giving notice to the assessee subject to such just exceptions as an assessee can take under law. The direction given by the Appellate Assistant Commissioner was to make fresh assessment on Aruna Devi in accordance with the provisions of the Act.

14. Counsel for Aruna Devi relied on the decision of this Court in *Income-tax Officer, Sitapur v. Murlidhar Bhagwan-das*¹, in support of the proposition that no finding was necessary in the present case because Aruna Devi was not an assessee and was a different person. We find that Aruna Devi was an assessee in the income-tax proceedings, but the proceedings were not in compliance with the Act by reason of the failure of giving the requisite notice of assessment and the requisite notice of demand. In *Murlidhar's case*¹, the assessee appealed against an assessment order and the Appellate Assistant Commissioner held that the income was received in the previous accounting year and directed that the amount should be deleted from the assessment year 1949-50 and included in the assessment year 1948-49. Pursuant to that direction the Income-tax Officer initiated re-assessment proceedings in respect of the year 1948-49 and served a notice on 5th December, 1957. The question was whether the second proviso applied and saved the notice in respect of the year 1948-49. It was held that the jurisdiction of the Appellate Assistant Commissioner under section 31 of the 1922 Act was strictly confined to the assessment order of the particular year under appeal and the assessment or re-assessment made in consequence of or to give effect to any finding or direction contained in an order under sections 31, 33-A, 33-B, and 66 or 66-A must necessarily relate to the assessment of the year under appeal. The expression "finding and direction" in the second proviso to section 34 (3) was held to be a finding necessary for giving relief in respect of the assessment in question and that a direction which the appellate or the revisional authority was empowered to give under the sections mentioned in that proviso. The finding in *Murlidhar's*

1. (1964) 52 I.T.R. 335 : (1964) 6 S.C.R. 411 : (1964) 1 I.T.J. 599 ; (1964) 1 S.C.J. 583 : A.I.R. 1965 S.C. 342.

case¹ that the income belonged to the year 1948-49 was not a finding necessary for the disposal of an appeal in respect of the year of assessment in question

15 Counsel for Aruna Devi contended that the expression "any person" occurring in the second proviso to section 34 (3) of the Act could not be referable to a stranger and that Aruna Devi was a stranger. In support of that proposition reliance was placed on the decision of this Court in *S. C. Prashar and another v. Vasanten Dwarakadas and others*². The facts of that case are entirely different and are of no assistance for the reason that in the present appeals Aruna Devi was impleaded as a party to the assessment proceedings as a legal representative of Rangalal Jajodia. The words "any person" were construed in *Murlidhar's case*¹ to be confined to a person intimately connected with the assessment year under appeal. It was said in that case that "modification or setting aside of assessment made on a firm joint Hindu family, association of persons for a particular year may affect the assessment for the said year on a partner or partners of the firm, member or members of the Hindu undivided family or the individual as the case may be. In such cases though the latter are not *eo nomine* parties to the appeal their assessments depend upon the assessments on the former. The said instances are only illustrative. It is not necessary to pursue the matter further. We would, therefore, hold that the expression 'any person' in the setting in which it appears must be confined to a person intimately connected in the aforesaid sense with the assessments of the year under appeal." In the present appeals the finding was that the assessment was made on Aruna Devi but no notice was given to her. The necessary direction was therefore given that notice should be given to her. Aruna Devi was heard and the assessment was made. She was not merely intimately connected with the assessment. She was in fact an assessee. Therefore the second proviso to section 34 (3) applied.

16 We are therefore of opinion that the second proviso to section 34 (3) of the Act

applies to the present appeals because first the proceedings against Rangalal Jajodia commenced on filing of returns before the Income tax authorities, secondly, the assessment proceeding continued after the death of Rangalal Jajodia against the legal representatives Shankarlal Jajodia and Aruna Devi, thirdly, the assessment proceedings on being set aside and not cancelled pursuant to the appeal filed by Shankarlal Jajodia on the ground that notice was not given to Aruna Devi were continued and fourthly, the setting aside of the assessment was only on the ground that notice was not given to Aruna Devi and therefore the finding and direction was vital to the assessment proceedings. The High Court was in error in holding that the assessment proceedings were barred by limitation.

17 The other question is as to the applicability of section 24 B of the Act. Counsel on behalf of Aruna Devi repeated the contentions advanced in the High Court that section 24 B does not cover the entire field of procedure to be followed in assessing the income of the deceased person. The High Court held that section 24 B of the Act applied but Aruna Devi should have been given opportunities to object to the assessment by repeating the entire procedure of section 24 B of the Act as during the lifetime of the deceased Counsel for the Revenue did not impeach the conclusion of the High Court that in relation to Aruna Devi the provisions of section 24 B of the Act were to be followed *de novo*. We are of opinion that the High Court correctly held that section 24 B of the Act applies to the present case. The third sub-section of section 24 B deals with a case of a person dying after having furnished a return. Further in the present case the Income tax Officer had reason to believe the return to be incorrect or incomplete and he called upon Rangalal to furnish evidence. The Act further confers power on the Revenue officer to make the assessment and determine the tax payable by the deceased on the basis of the assessment and for that purpose to issue appropriate notice which would have had to be served upon the deceased had he survived and in that behalf to require from the executor, administrator or other legal representative of the deceased person any accounts, documents or other evidence which he

¹ (1964) 52 I.T.R. 335 (1964) 6 S.C.R. 411 (1964) 11 T.J. 592 (1964) 1 S.C.J. 533 A.I.R. 1965 S.C. 342

² (1963) 49 I.T.R. 1 (1964) 1 S.C.R. 29 (1963) 1 S.C.J. 687 A.I.R. 1963 S.C. 1356

might under the provisions of sections 22 and 23 require from the deceased person. These provisions adequately answer the contention of the appellant Aruna Devi.

18. For these reasons we hold that the High Court was in error in holding that the second proviso to section 34 (3) of the Act, did not save the assessments and therefore we set aside the judgment of the High Court and allow the appeals of the Revenue in C.A. Nos. 2336-2339 of 1966.

19. As for appeals C. A. Nos. 2332-2335 of 1966 we uphold the conclusion of the High Court and dismiss the appeals. Each party will bear and pay its own costs in all these appeals.

T. K. K.

Appeals Nos.
2336-2339 *allowed.*

Appeals Nos.
2332-2335 *dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*J. C. Shah, C.J., K. S. Hegde and A. N. Grover, JJ.*

Commissioner of Income-tax, Andhra Pradesh, Hyderabad ... Appellant*
v.

Jayalakshmi Rice and Oil Mills Contractor Co. ... Respondent.

(A) *Income-tax Act (IX of 1922), section 26-A and rule 2 of the rules made under section 59—Registration of firm—Application—Receipt of application within relevant previous year—Application for registration of firm under Partnership Act filed within the relevant previous year but entry in the register of firms made after the end of the previous year—Application under section 26-A whether effective.*

The application filed by the assessee for the registration of the firm under section 26-A of the Act was received by the Officer before the end of the relevant previous year. The application for registration of the firm before the Registrar of Firms, under the Partnership Act was filed before the end of the relevant previous year but an entry in the registers of the Registrar of Firms was however made after the end of the relevant previous year. The Department and the

Tribunal held that the application under the Act was out of time. But the High Court held that the application was in time under rule 2 (b) of the rules in the view that the entry made by the Registrar of Firms would render the registration effective from the date of the application under section 58 of the Partnership Act. The Revenue appealed.

Held: the application for registration under section 26-A is out of time. Under rule 2 (b) of the rules an application for registration of the firm under section 26-A of the Act could be made before the end of the previous year of the firm only where the firm is registered under the Partnership Act. The reasoning of the High Court and its conclusion that the partnership should be deemed to be registered on the date the application therefor was presented and that the requirements of rule 2 (b) would be satisfied if it became registered under the Partnership Act even after the application under section 26-A was filed cannot be concerned with

[*Paras. 6, 3 and 5*]

(B) *Partnership Act (IX of 1932), sections 58 and 59—Application for registration of firm made before Registrar of Firms—Necessary entry made in the register of firms subsequently—Registration effective from date of entry and not from date of application for registration*

Under the Partnership Act, the registration of a firm takes place only when the necessary entry is made in the register of firms under section 59 of the Partnership Act and not from the date of the application made under section 58 of the Act.

[*Para. 4.*]

Appeal from the Judgment and Order, dated the 15th April, 1966, of the Andhra Pradesh High Court in Case Referred No. 40 of 1963.*

S C. Manchanda, Senior Advocate (*B. D. Sharma* and *R. N. Sachinley*, Advocates, with him), for Appellant.

K. Rajendra Chaudhuri, Advocate, for Respondent.

The Judgment of the Court was delivered by

Grover, J.—This is an appeal from a judgment of the Andhra Pradesh High

* C.A. No. 545 of 1967.

15th January, 1971

* (1967) 1 A.W.R. 192 : (1967) 1 I.T.J. 364 : 64 J.T.R. 125. A.I.R. 1967 A. P. 99.

Court arising out of a reference made under section 66 (1) of the Income tax Act, 1922, hereinafter called the "Act" on the question whether on the facts and in the circumstances of the case the application under section 26-A of the Act was filed out of time

2 The facts are not in dispute The assessee firm was constituted under a deed of partnership dated 6th October, 1955 It was to come into existence with effect from 5th November 1954 The assessee filed an application under section 26-A of the Act for registration of the firm for the assessment year 1956-57 The "previous year" of the firm was shown as the year ending 26th October, 1955 This application was received by the Income-tax Officer on 14th October, 1955 On 20th October 1955, the assessee filed before the Registrar of Firms a statement under section 58 of the Indian Partnership Act 1932 On 2nd November, 1955 the Registrar of Firms filed the statement of the assessee and made entries in the register of firms On 23rd March 1961 the Income tax Officer passed an order refusing to register the firm under section 26-A, *inter alia* for the reason that the application had not been made in time The appeal taken to the Appellate Assistant Commissioner by the assessee failed The Income tax Appellate Tribunal also upheld the order of the Income tax Officer and the Appellate Assistant Commissioner On that a reference was sought and the High Court answered the question referred in favour of the assessee on the ground that the application had been filed in time

3 Section 26-A of the Act provides that an application may be made to the Income-Tax Officer on behalf of any firm constituted under an instrument of partnership specifying the individual shares of the partners for registration for the purposes of the Act The application has to be made by such person or persons and at such time and has to contain such particulars etc as may be prescribed Rules 2 to 6 (b) of the rules made under section 59 of the Act deal with registration of firms We are concerned with the following material portion of rule 2 —

(a) Where the firm is not registered under the Indian Partnership Act (IX of 1932) or where the deed of partnership is not registered under the Indian Registration Act (XVI of 1908) and the application for registration is being made for the first time under the Act

(i) Within a period of six months of the constitution of the firm or before the end of the previous year of the firm whichever is earlier if the firm was constituted in that previous year

(ii) before the end of the previous year in any other case

(b) Where the firm is registered under the Indian Partnership Act (IX of 1932) or where the deed of partnership is registered under the Indian Registration Act (XVI of 1908) before the end of the previous year of the firm

Now it is common ground that the application for registration was not made within the period prescribed by rule 2 (a) What has been urged throughout on behalf of the assessee is that the application to the Income tax Officer was governed by rule 2 (b) and was in time as the firm should be deemed to have been registered not on the date on which it was actually registered by the Registrar of Firms but with effect from the date on which the application for registration was presented to the Registrar In other words the firm should be considered to have been registered on 20th October, 1955 on which date the statement under section 58 of the Partnership Act was filed by the assessee before the Registrar of Firms

4 The real question which has to be determined is whether the registration of a firm under the Partnership Act takes place with effect from the date on which the application for registration is made in accordance with section 58 of that Act. Section 58 (1) provides that the registration of a firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated a statement in the prescribed form and accompanied by the prescribed fee stating Under section 59 when the Registrar is satisfied that the provisions of section 58 have been duly complied with he shall record an entry of the statement in a register called the "register of firms" and shall file the statement In *Ram*

" Such application shall be made ...

*Prasad v. Kanta Prasad*¹, it was laid down that the registration of a firm under the Partnership Act takes place only when the necessary entry is made in the register of firms. Even under section 69 of the Partnership Act which deals with the effect of non-registration it has been consistently held that the registration of a firm subsequent to the filing of the suit did not cure the defect: See *Danwal Parshotamdas v. Baburam Chhotelal*². Thus under the Partnership law it can be taken to have been settled by decisions of High Courts from a long time that the registration of a firm takes place only when the necessary entry is made in the register of firms under section 59 of the Partnership Act by the Registrar. It is true that sub-section (1) of section 58 employs language which without anything more may lend support to the view that the registration of a firm may be effected merely by sending an application which would mean that as soon as an application is sent and if entry is made under section 59 pursuant to it the registration would be effective from the date when the application was presented. But section 58 (1) is not to be read in isolation and has to be considered along with the scheme of the other provisions of the Act, namely, section 59 and section 69. The latter section may not have a direct bearing on the point under our consideration but it throws light on what was contemplated by the Legislature with regard to the point of time when the firm could be regarded as registered. The Kerala High Court has in *Kerala Road Lines Corporation v. Commissioner of Income-tax, Kerala*³, clearly expressed the view that reading sections 58 and 59 of the Indian Partnership Act together, a firm cannot be said to be registered when the statement prescribed by section 58 and the required fee are sent to the Registrar and that the registration of the firm is effected only when the entry of the statement is recorded in the register of firms and the statement is filed by the Registrar as provided in section 59. In that case

also an identically similar question arose in respect of registration of a firm under section 26-A of the Income-tax Act.

5. The High Court in the judgment under appeal referred to the statement extracted from the report of the Special Committee which had been appointed by the Government of India to examine the provisions of the Bill before it came to be passed by the Central Legislature as the Partnership Act and reference was made in particular to the statement relating to clause 58 corresponding to section 59 of the Partnership Act to the effect that the Registrar was a mere recording officer and that he had no discretion but to record the entry in the register of firms. We are unable to see how that statement can be taken into consideration for the purpose of interpreting the relevant provisions of the Partnership Act. We also cannot concur with the other reasoning of the High Court for coming to the conclusion that the partnership should be deemed to have been registered on the date when the application was presented and that the requirement of rule 2 (b) would be satisfied if it became registered under the Partnership Act even after the application was filed.

6. For the reasons given above the appeal is allowed and the judgment of the High Court is set aside. The answer to the question referred must be given in the affirmative and against the assessee. The appellant shall be entitled to costs in this Court.

K. G. S. ——— Appeal allowed.

1. 1935 All.L.J. 1243: 157 I.C. 154: A.I.R. 1935 All. 898.

2. I.L.R. (1936) 58 All. 495: 1935 All.L.J. 1245: 160 I.C. 277: A.I.R. 1936 All 3.

3. (1964) 51 I.T.R. 711: 1963 K.L.T. 795: (1963) 2 K.L.R. 166: I.L.R. (1964) 1 Ker. 579: A.I.R. 1964 Ker. 251.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — J C Shah, C.J., K S Hegde
and A N Grover, JJ

Western States Trading Co (P) Ltd

Appellant*

Commissioner of Income-tax (Central)
Calcutta

Respondent

Income tax Act (XI of 1922) sections 10 (2) (vii) 24 (2)—Business income—Computation of—Allowances—Sale of colliery business—Business carried on by assessee during part of relevant accounting year—Agreement for sale—Assessee to carry on business on behalf of purchaser as on and from relevant accounting year—Closing down sale—Price less than book value—Assessee whether entitled to balancing allowance

Loss—Carry forward and set-off—Colliery business carried on during part of relevant assessment year—Sale of business—Loss in business in earlier years—Whether can be set off against dividend from shares held as stock in trade

The assessee which owned a colliery entered into an agreement with another company on 29th November 1954 to sell the colliery to it. According to this agreement the vendor was to sell and the purchaser was to buy as on and from 1st September 1954, on the account and at the cost of the purchaser. The price was fixed less than the book value of the assets. For the assessment year 1956-57, the relevant accounting year being from 1st September 1954 to 31st August 1955, the assessee claimed a balancing allowance under section 10 (2) (vii) of the Indian Income tax Act 1922. The Income tax Officer and the Appellate Assistant Commissioner disallowed the claim. The Tribunal accepted the contention of the assessee that it carried on business till 29th November 1954 but did not allow the loss as the Tribunal was of the view that it had resulted from a closing down

sale. There was another item of dividends received from certain shares held by the assessee during the relevant accounting year. The Income tax Officer included these dividends in the company's income under section 12 of the Act. The assessee failed to satisfy the authorities that the income received on account of the dividends could be set-off against the loss in business of earlier years brought forward. On a reference the High Court took the view that the sale was a closing down sale and the net result of the transaction was that the assessee was working the colliery from 1st September, 1954 for and on account of the purchaser. While recognising that the coal business was not stopped as from 1st September, 1954, the High Court came to the conclusion that it was on account of the purchaser that the business was carried on and any profits or losses which might have resulted until the actual sale were to be those of the purchaser and the vendor was to get only the price fixed together with interest and held that the assessee was not entitled to the allowance. The High Court also held that no colliery business in the relevant year was carried on by the assessee and therefore no question of set-off could arise. On appeal to the Supreme Court

Held, that all the conditions necessary for the allowance under section 10 (2) (vii) were satisfied and the assessee was entitled to the allowance claimed. The colliery business was carried on by the assessee during part of the relevant accounting year. The machinery and plant had been used for the purpose of the business. The sale of the colliery took place during accounting year. The loss of Rs 11,257 was written off in the books of the assessee. There was nothing to show that the business of the assessee should have been carried on for the whole year or that the machinery or plant should have been used for the whole of the accounting period or if the assessee worked only for a part of the year and then sold out the loss that he incurred was not a business loss. The Tribunal had recorded a finding which was one of fact that in the relevant accounting year the assessee did carry on colliery business. It was not open to the High Court to go against the finding of the Tribunal and hold that

* CAs Nos 489 and 590 of 1967

18th January 1971

the business was carried on for and on account of the purchaser. By means of the agreement it was not possible to alter the actual state of affairs, namely, the carrying on of the business by the assessee. [Paras. 6 and 7.]

The amount of the dividends would form a part of the income from business of the assessee if the shares were a part of the assessee's trading assets and the assessee would be entitled to a set-off as claimed against the loss from its business incurred during the previous years. It was not disputed at any stage that the shares formed part of the stock-in-trade of the share dealing business of the assessee. There could be no reason, therefore, for the assessee not being entitled to the set-off claimed under section 24 (2).

[Para. 8.]

Appeals by Special Leave from the Judgment and Order, dated the 7th May, 1965, of the Calcutta High Court in Income-tax References Nos. 183 and 238 of 1961.

C. K. Daphtary, Senior Advocate, (*B. P. Maheshwari* and *N. R. Khaitan*, Advocates, with him), for Appellant (In both the Appeals).

S. C. Manchanda, Senior Advocate, (*S. K. Aiyar*, *R. N. Sachthey* and *B. D. Sharma*, Advocates, with him), for Respondent (In both the Appeals).

The Judgment of the Court was delivered by

Grover, J.—These appeals by Special Leave from a judgment of the Calcutta High Court arise out of certain questions of law which were referred relating to the assessment for the assessment year 1956-57, the relevant accounting year being from 1st September, 1954 to 31st August, 1955.

2. The assessee owned a colliery called the Western Kajoria Colliery, hereinafter referred to as "colliery". It entered into an agreement with another company on 29th November, 1954, to sell the colliery to it. According to this agreement the vendor was to sell and the purchaser was to buy as on and from 1st September, 1954, all the underground rights, etc., of the colliery with the machinery and other articles detailed in the schedules annexed to the agreement. It is not necessary to

give the details of the other stock-in-trade which the purchaser was to purchase. The sale was to be completed within one year from the date of the execution of the agreement. According to clause 7 of the agreement pending completion of the sale or delivery of possession of the premises to the purchaser the vendor was to carry on business on behalf of the purchaser and run the said colliery as on and from 1st September, 1954, on the account and at the cost of the purchaser. The purchaser was to get all the profits and was liable for all the losses from that date.

3. The price fixed for the colliery was Rs. 3,50,000. The book value of the assets was Rs. 4,80,290. In the relevant assessment year the loss of Rs. 70,290 was claimed by the assessee. The Income-tax Officer rejected the claim for deduction of the loss from the assessee's other income on the ground that during the accounting period the assessee did not carry on the business of colliery since the transfer took place with effect from 1st September, 1954. After making adjustment for certain assets which, according to the Income-tax Officer, were not entitled to depreciation he determined the figure of loss to be Rs. 11,257. This loss was also disallowed. The Appellate Assistant Commissioner upheld the order of the Income-tax Officer. The Appellate Tribunal, however, accepted the contention of the assessee that it carried on business till 29th November, 1954, but did not allow the loss as the Tribunal was of the view that it had resulted from a closing down sale.

4. There was another item of dividends, received from certain shares held by the assessee during the relevant accounting year. The Income-tax Officer included these dividends in the company's income under section 12 of the Income-tax Act, 1922, hereinafter called the "Act". The assessee failed to satisfy the authorities that the income received on account of the dividends could be set-off against the loss in business of earlier years brought forward. The Tribunal made a reference of the following two questions under section 66 (1) of the Act :

"(1) Whether on the facts and in the circumstance of the case the sum of Rs. 11,257 being a claim for loss on sale of assets on which depreciation was allowable in earlier

years is allowable under section 10 (2) (vi) in computing the total income of the assessee?

(2) Whether on the facts and in the circumstances of the case dividend income was to be taken as income profits and gains of business of the company and set-off against losses brought forward from earlier years under section 24 (2)?"

Since certain other questions had been sought to be referred by the assessee in respect of which the Tribunal declined to make a reference the assessee moved the High Court and the High Court directed that the following questions be referred

(3) Whether in the facts and circumstances of the case the interest income from Western Kajoria Collieries Ltd. is income taxable under section 10 of the Indian Income-tax Act or under section 12 of the said Act?

(4) Whether on the facts and circumstances of the case there was any material to hold that the loan of M/s Shree Vajoy Corporation Ltd. was an accommodation loan not advanced during the normal course of money lending business?

(5) If the answer to question (4) is that the loan was a business loan whether the debt had become bad in the year of account and deductible in computation of the total income?

(6) Whether in the facts and circumstances of the case the Tribunal was right in refusing to allow set-off of earlier years' business losses under section 24 (2)?"

The two references were dealt with together by the High Court

5 On the first question the High Court was of the view that the sale was a closing down sale and the net result of the transaction was that the assessee was working in the colliery from 1st September 1954 for and on account of the purchaser. While recognising that the coal business was not stopped as from 1st September 1954 the High Court came to the conclusion that it was on account of the purchaser that the business was carried on and any profits or losses which might have resulted until the actual sale were to be those of the purchaser and the vendor was to get only the price fixed together with interest. The first question was answered against the assessee. The second question was also answered against the assessee on the view that no colliery business in the relevant year was carried on by it and therefore no question of set-off could arise. The third and the fourth questions were answered in accordance with the findings of fact given by the

Tribunal and against the assessee. The fifth question was not pressed and was not answered. The sixth question was covered by the second question and therefore no answer was returned with regard to it as well.

6 In the present appeals we are concerned with the first and the second question. It has been submitted on behalf of the appellant that the loss of Rs 11,257 was allowable under section 10 (2) (vi) of the Act in computing the total income of the appellant. The Tribunal had recorded a finding which was one of fact, that in the relevant accounting year the appellant did carry on the colliery business. The finding of the Tribunal had not been challenged by the department by raising an appropriate question and therefore it was not open to the High Court to go against the finding of the Tribunal and hold that the business was carried on for and on account of the purchaser. At any rate it was an undisputable fact that the appellant carried on the business upto 29th November, 1954 and it was only by virtue of the agreement made on that day that it agreed to treat the business as having been transferred to the purchaser with effect from 1st September 1954. By means of the agreement it was not possible to alter the actual state of affairs, namely the carrying on of the business by the appellant.

7 In our judgment there is a good deal of substance in the above contentions urged on behalf of the appellant. The Tribunal had, in clear and unequivocal terms, upheld the contention of the appellant that it had actually carried on the business till 29th November 1954. Section 10 (2) (vi) provides that profits or gains shall be computed after making the allowance in respect of any such building, machinery or plant which had been sold etc. the account by which the written down value thereof exceeds the amount for which the building, machinery or plant is actually sold or its scrap value. The first proviso requires that such amount should actually be written off in the books of the assessee. It is difficult to see how all the conditions necessary for the allowance under the above provisions were not satisfied. The colliery business was carried on by the appellant during part of relevant accounting year. The machinery and

plant had been used for the purpose of the business. The sale of the colliery took place during the accounting year. The loss of Rs. 11,257 was written off in the books of the appellant. The present case appears to be covered by the decision of this Court in *Commissioner of Income-tax, Bombay City II v. National Syndicate*¹, in which all the above conditions for the applicability of section 10 (2) (vii) were held to be present. It was said that there was no other conditions to be found in the section or in the Act which had to be complied with. There was nothing to show that the business of the assessee should have been carried on for the whole year or that the machinery or plant should have been used for the whole of the accounting period or if the assessee worked only for a part of the year and then sold out, the loss that he incurred was not a business loss. The decisions which were relied upon by the High Court are hardly of much assistance in the matter and are distinguishable on facts. The first question should have been answered in favour of the assessee.

8. On the second question once it is accepted that the colliery business was carried on for a part of the relevant assessment year the assessee would be entitled to get a set-off under section 24 (2) of the Act if the shares on account of which the dividends were received formed part of the assessee's trading assets. It is well-settled by the decisions of this Court (see *Commissioner of Andhra Pradesh v. Cocanda Radhaswami Bank Ltd.*²), that section 6 of the Act classifies the taxable income under the several heads but the scheme is that income-tax is one tax and section 6 only classifies the taxable income under different heads for the purpose of computation of the net income of the assessee. While sub-section (1) of section 24 provides for setting off the loss under one of the heads mentioned in section 6 against the profits under a different head in the same year sub-section (2), provides for the carrying forward of the loss for one year and setting off the same

against the profits or gains of the assessee from the business in the subsequent year or years. It was emphasised in the aforesaid decision that sub-section (2) of section 24 in contradistinction to sub-section (1) is concerned only with the business and not with its heads under section 6 of the Act. Dividends are included in the meaning of income under sub-section (1-A) of section 12 which is the residuary head. Applying the principles adverted to, before the amount of dividends would form a part of the income from business of the assessee if the shares were a part of the assessee's trading assets and the assessee would be entitled to a set off as claimed against the loss from its business incurred during the previous years. It does not appear to have been disputed at any stage that the shares formed part of the stock-in-trade of the share dealing business of the assessee. There could be no reason, therefore, for the assessee not being entitled to the set-off claimed. The High Courts have consistently taken the view that business loss carried forward from earlier years can be set-off against dividend income derived from shares held as stock-in-trade. (Vide *Commissioner of Income-tax, Madhya Pradesh v. Shrikishan Chandmal*¹ and *Commissioner of Income-tax, Ahmedabad v. Bhavnagar Trust Corporation (P.) Ltd.*²). The second question, therefore, should have been answered in favour of the assessee.

9. In the result the appeals are allowed with costs in this Court and the decision of the High Court is set aside only with regard to questions 1 and 2, the answers to which are returned as already indicated. One hearing fee.

T.K.K. — Appeals allowed.

1. (1961) 41 I.T.R. 225 : (1961) 2 S.C.R. 229 : (1962) 2 S.C.J. 640

2. (1965) 57 I.T.R. 306 : (1965) 2 I.T.J. 346 : (1965) 2 Comp. L.J. 120 : (1965) 2 An.W.R. (S.C.) 36 : (1965) 2 M.L.J. (S.C.) 36 : (1965) 2 S.C.J. 489 : (1965) 3 S.C.R. 619.

1. (1966) 60 I.T.R. 303.

2. (1968) 69 I.T.R. 278 : (1968) 2 I.T.J. 690.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — J C Shah G K Mitter, K S Hegde, A N Grover and A N Ray, JJ

The Check Post Officer, Coimbatore etc.
Appellants*

M/s K P Abdulla and Brothers

Respondent

Madras General Sales Tax Act (I of 1959), section 42 (3)—Validity

Entry 54 of List II of the Seventh Schedule to the Constitution authorises the State Legislature to legislate in respect of taxes on the sale or purchase of goods. A legislative entry does not merely enunciate powers; it specifies a field of legislation and the widest import and significance should be attached to it. Power to legislate on a specified topic includes power to legislate in respect of matters which may fairly and reasonably be said to be comprehended therein. A taxing entry therefore confers power upon the Legislature to legislate for matters ancillary or incidental including provisions for preventing evasion of sales tax. But the power to confiscate goods carried in a vehicle cannot be said to be fairly and reasonably comprehended in the power to legislate in respect of tax on sale or purchase of goods. Thus, the power conferred by sub-section (3) of section 42 of the Madras General Sales Tax Act, 1959, to seize and confiscate and to levy penalty in respect of all goods which are carried in a vehicle whether the goods are sold or not is not incidental or ancillary to the power to levy sales tax. The sub-section is therefore *ultra vires* the State Legislature. [Paras 4 and 6]

Appeals from the Judgment and Order dated the 23d September, 1968 of the Madras High Court in Writ Appeals Nos 106 and 107 of 1968

A K Sen Senior Advocate, (A V Rangam, Advocate, with him), for Appellants (In both the Appeals)

T A Ramachandran, Advocate, for Respondent (In both the Appeals)

The Judgment of the Court was delivered by

Shah, J—Motor Lorry No K L R 3919 driven along a highway from Coimbatore in the State of Madras towards the border of the State of Kerala was when searched by the Check Post Officer found to carry 85 bags of food stuffs—45 bags of maida, 20 bags of flour, and 20 bags of Khanda sari sugar. The driver of the motor lorry was found to carry with him a bill of sale and a delivery note which covered 85 bags of flour. On the ground that with out a bill of sale or delivery note maida and Khandasari sugar were attempted to be transported and suspecting that there was an attempt at evasion of sales tax, the Check Post Officer by order dated 2nd March, 1965, confiscated the goods and gave an option to M/s K P Abdulla and Brothers the owners of the goods to pay Rs 1,000 as penalty in lieu of confiscation.

2 The owners of the goods then moved a petition in the High Court of Madras challenging the validity of section 42 (3)(a) of the Madras General Sales Tax Act, 1959, and for an order quashing the penalty, and another petition for a direction to the State of Madras and the Check Post Officer to return the goods seized and 'confiscated while in transit'. Ramakrishnan J, rejected the petitions. In appeals filed by the owners, the petitions were allowed and the orders imposing penalty and confiscation of goods were set aside. The State of Madras has appealed to this Court with certificate granted by the High Court.

3 Section 42 of the Madras General Sales Tax Act, 1959, provides

"(1) If the Government consider that with a view to prevent or check evasion of tax under this Act in any place or places in the State, it is necessary so to do, they may, by notification, direct the setting up of a check post or the erection of a barrier or both at such place or places as may be notified

"(2) At every check post or barrier mentioned in sub-section (1), or at any other place when so required by any officer empowered by the Government

in this behalf, the driver or any other person in charge of any vehicle or boat shall stop the vehicle or boat, as the case may be, and keep it stationary as long as may reasonably be necessary, and allow the officer in charge of the check post or barrier, or the officer empowered as aforesaid, to examine the contents in the vehicle or boat and inspect all records relating to the goods carried, which are in the possession of such driver, or other person in charge, who shall, if so required, give his name and address and the name and address of the owner of the vehicle or boat as well as those of the consignor and the consignee of the goods.

(3) The officer in charge of the check post or barrier, or the officer empowered as aforesaid, shall have power to seize and confiscate any goods which are under transport by any vehicle or boat and are not covered by,

(i) a bill of sale or delivery note,

(ii) a Goods Vehicle Record, a Trip Sheet or a Log Book, as the case may be; and

(iii) such other documents as may be prescribed under sections 43 and 44 :

Provided that before ordering confiscation the officer shall give the person affected an opportunity of being heard and make an inquiry in the prescribed manner :

Provided further that the officer ordering the confiscation shall give the person affected option to pay in lieu of confiscation—

(a) in cases where the goods are taxable under this Act, in addition to the tax recoverable a sum of money not exceeding one thousand rupees, or double the amount of tax recoverable, whichever is greater; and

(b) in other cases, a sum of money not exceeding one thousand rupees.”

By sub-section (2) the driver or any person in charge of the vehicle is required to stop the vehicle and to allow the officer in charge of the check post or barrier to examine the contents in the vehicle, and to inspect all records relating to the goods carried in the vehicle. The officer in

charge of the check post or barrier is invested with power by sub-section (3) to seize and confiscate any goods which are carried and are not covered by the documents specified therein. The officer is required when ordering confiscation to give the person affected option to pay penalty in lieu of confiscation.

4. Entry 54 of List II of the Seventh Schedule to the Constitution authorises the State Legislature to legislate in respect of taxes on the sale or purchase of goods. A legislative entry does not merely enunciate powers: it specifies a field of legislation and the widest import and significance should be attached to it. Power to legislate on a specified topic includes power to legislate in respect of matters which may fairly and reasonably be said to be comprehended therein; See *The United Provinces v. Mst. Atiqa Begum and others*¹, *Navinchandra Mafallal v. The Commissioner of Income-tax, Bombay City*², and *Balaji v. Income-tax Officer, Special Investigation Circle*³. A taxing entry therefore confers power upon the Legislature to legislate for matters ancillary or incidental including provisions for preventing evasion of tax. Sub-sections (1) and (2) of section 42 are intended to set up machinery for preventing evasion of sales tax. But, in our judgment, the power to confiscate goods carried in a vehicle cannot be said to be fairly and reasonably comprehended in the power to legislate in respect of taxes on sale or purchase of goods. By sub-section (3) the officer in charge of the check post or barrier has the power to seize and confiscate any goods which are being carried in any vehicle if they are not covered by the documents specified in the three sub-clauses. Sub-section (3) assumes that all goods carried in a vehicle near a check post are goods which have been sold within the State of Madras and in respect of which liability to pay sales tax has arisen, and authorises the check post officer, unless the specified documents are produced at the check post or the barrier to seize and confiscate the goods and to

1. (1940) F.C.R. 110 : (1941) 1 M.L.J. (Supp.) 65.

2. (1955) 1 S.C.R. 829 : (1959) S.C.J. 158 : (1955) 1 M.L.J. (S.C.) 87 : 26 I.T.R. 758.

3. (1962) 2 S.C.R. 983. 43 I.T.R. 393 : (1961) 1 S.C.J. 376.

give an option to the person affected to pay penalty in lieu of confiscation. A provision so enacted on the assumption that goods carried in a vehicle from one State to another must be presumed to be transported after sale within the State is unwarranted. In any event power conferred by sub-section (3) to seize and confiscate and to levy penalty in respect of all goods which are carried in a vehicle whether the goods are sold or not is not incidental or ancillary to the power to levy sales tax. A person carrying his own goods even of personal luggage from one State to another or for consumption, because he is unable to produce the documents specified in clauses (i), (ii) and (iii) of sub-section (3) of section 42, stands in danger of having his goods forfeited. Power under sub-section (3) of section 42 cannot be said to be ancillary or incidental to the power to legislate for levy of sales tax.

5 The High Court was of the view that the question which fell to be determined was concluded by the judgment of this Court in *The Commissioner of Commercial Tax and others v R S Jhavar and others*¹. That case arose under section 41 (2) of the Madras General Sales Tax Act I of 1959, and this Court struck down the power conferred under the Madras General Sales Tax Act 1959, upon the officer of the Government to seize such accounts registers records or other documents of the dealer as he may consider necessary, if he had reason to suspect that any dealer is attempted to evade payment of any tax fee or other amount. This Court held that tax and penalty cannot be levied before the first sale in the State, and on that account authority conferred to levy tax and penalty before the sale and to confiscate the goods for non payment was outside the legislative competence of the State. That case may have no direct bearing in this case.

6 In the present case, however, the power to confiscate the goods and to levy penalty in lieu of confiscation, when in respect of the goods found in a vehicle the driver of the vehicle is not carrying

with him the documents specified therein, is not a provision which is ancillary or incidental to the power to tax sale of goods.

7 The appeals therefore fail and are dismissed with costs. One hearing fee.

V K.

Appeals
dismissed

THE SUPREME COURT OF INDIA (Original Jurisdiction)

PRESENT — *M Hidayatullah, C.J., J M Shelat V Bhargava G K Mitter, C A Vaidialram, A N Ray and I D Dua, JJ*

Madhu Limaye and another Petitioners*

v

Ved Murti and others Respondents
Mr Raj Narain Intervener

Constitution of India (1950) Article 348—Language of Supreme Court is English—Intervener in a habeas corpus petition—Insisting in arguing in Hindi—Not understood by the members of the Bench—Intervention cancelled

Where an intervener in a habeas corpus petition, who had a Counsel (in attendance), insisted in arguing his case himself in Hindi—Not the language of the Court and not understood by the members of the Bench and would not agree to the alternatives suggested by the Court, the only alternative for the Court is to cancel his intervention.

[Para 2]

Petition under Article 32 of the Constitution of India for a writ in the nature of habeas corpus.

Madhu Limaye Petitioner in person, No 1 K Rajendra Chaudhary and Pratap Singh Advocates for Petitioner No 2.

C K Daphtary and Dr L M Singhvi Senior Advocates (O P Rana Advocate, with them) for Respondents.

Niren De Attorney General for India (R H Dhbar H R Khanna S P Nayyar and R N Sachdev, Advocates with him) for Attorney General for India and Union of India.

¹ (1968) 1 SCR. 143 (1968) 1 MLJ (S.C.) 43 (1968) 1 An W.R. (S.C.) 43 (1957) 2 ITJ 919 (1968) 1 S.C.J. 121 A.I.R. 1968 S.C. 59

S. C. Agarwal and D. P. Singh, Advocates, for Intervener and Raj Narain, in person.

The Court made the following

ORDER.—Mr. Raj Narain yesterday insisted on arguing in Hindi. He was heard for sometime with a view to see whether we could follow him, simply because this is a *habeas corpus* petition involving the liberty of the citizen. Because of the importance of the case, we heard him for sometime, but the Attorney-General, Mr. Daphtary, who is opposing him and some of the members of the Bench could not understand the arguments made in Hindi yesterday. In these circumstances, it is futile to permit Mr. Raj Narain to continue his arguments in Hindi. He has a Counsel Mr. D. P. Singh, already in attendance and helping him. We suggested the following three alternatives,

(a) that he may argue in English ; or

(b) he may allow his Counsel to present his case ; or

(c) he may give his written arguments in English.

2. The language of this Court is English (see Article 348 of the Constitution). If Mr. Raj Narain, is not agreeable to these suggestions, and we understand, he is not, the only alternative for us is to cancel his intervention. We order accordingly.

K.G.S.

Order accordingly.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—*J. C. Shah, K. S. Hegde and A. N. Grover, JJ.*

The President, Union of India and another
.. Appellants*

v.

Kalinga Construction Co. (P.) Ltd.

... Respondent.

(A) *Arbitration Act (X of 1940), section 39—Appeal against order setting aside an award—Scope.*

In an appeal against an order under sections 30 and 33 of the Arbitration Act,

setting aside an award, the appellate Court cannot decide the matter as if it was entertaining an appeal against the award itself. It cannot sit in appeal over the conclusions of the arbitrator and re-examine and re-appraise the evidence which had been considered by the arbitrator [Para. 9.]

(B) *Arbitration Act (X of 1940), section 30—Arbitrator's conclusion not vitiated by any error apparent in his award—Award cannot be set aside.* [Para. 10.]

Appeal from the Judgment and Decree dated the 18th February, 1965 of the Orissa High Court in Misc. Appeal No. 53 of 1962.

S. T. Desai, Senior Advocate (Gobind Das and R. N. Sachthey, Advocates, with him), for Appellants.

V. T. Rangaswami, T. Raghavan, B. Datta and D. N. Misra, Advocates and J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji & Co., for Respondent.

The Judgment of the Court was delivered by

Grover, J.—This is an appeal by certificate from a judgment of the Orissa High Court relating to an award given by Shri A. V. Viswanatha Sastri, an Ex-Judge of the Madras High Court in a dispute which arose between the respondent and the Union of India in respect of a claim made by the former for a sum of Rs. 35,45,080-91 which was stated to be due for earthwork done on the right dyke of the Hirakud Dam.

2. The Chief Engineer, Hirakud Dam, invited tenders on behalf of the Union of India for execution of work specifying certain details as to how tenders were to be submitted. It appears that before the tenders were invited certain estimates were prepared in the office of the Chief Engineer. The intending contractors were to submit tenders stating the rate for depositing earth on the Right Dyke site including all lifts and leads. The respondent-company submitted a tender which, according to the Chief Engineer, was not in the form invited by him as certain extraneous matters were stated to have been introduced. The Chief Engineer and the representatives of the respondent-company held a conference at which certain agreements were arrived at. The tender of the contractor was provi-

* C. A. No. 2023 of 1969.

sionally accepted on 28th December 1951, the formal contract was executed much later on 21st March 1953. The work started in February 1952 and took four years for completion. The earthwork was done by the company by manual labour for a year in the beginning and thereafter it was done to a large extent by machinery. The earth required to erect the dyke was dug up from certain areas demarcated by the Engineering Department near the site of the dyke. The places from which the earth had to be taken were called "borrow pits or borrow areas". The company dug up earth from the "borrow pits" and dumped it on the site of the dyke upto the required specifications. This involved movement of the loose earth both vertically and horizontally from the borrow pit to the dyke. The vertical movement was styled as lift and the horizontal movement as lead. When the company started employing the heavy machinery from the beginning of 1953 onwards a number of ramps had to be constructed to enable the machinery to go up from the borrow pits to the dyke.

3 It has not been disputed that for the earthwork done by the company it received payment from the Government of an amount aggregating Rs 1,08,19,543-00. This amount was paid in accordance with the rate in item 1-A of the contract (Exhibit P 69). According to that rate Rs 45 were to be paid for 100 cubic feet of earthwork of all kinds of soil laid in 6" layers with rough dressing including all lifts and average lead not exceeding 10'. According to the company an additional sum of Rs 28,20,786.75 was due in addition to the amount already paid in respect of extra leads including lifts. An amount of Rs 2 lakhs was claimed on account of the construction of ramps. The company further claimed a sum of Rs 5,34,288.16 on account of interest on the aforesaid two amounts. This claim was disputed by the Union of India and it was maintained on its behalf that the company had been fully paid for the earthwork done by it according to the terms of the contract and that the company was not entitled to payment for lifts nor was there any occasion for leads in excess of an average of 10' and further that the ramps in so far as they were outside the dyke were not to be paid for while those which had been in-

corporated in the dyke had already been paid for as a part of the dyke.

4 The agreement by which reference was made to the Arbitrator was as follows:

"The disputes and difference between the parties relating to payment of lift equivalent and leads for machine route are referred to the arbitration of Shri A. V. Viswanatha Sastri retired High Court Judge Madras and his award shall be final and binding on the parties."

5 On 16th November, 1958, the following issues were framed by the Arbitrator by the consent of both the parties:

(i) Is the claimant entitled to any payment for lifts under the terms of the contract between the parties?

NOTE -- Both sides agree that 1 foot of lifts is equal to $12\frac{1}{2}$ feet of lead.

(ii) Whether the claimant is entitled to payment for machine leads where machines have been used for earthwork and if so on what basis and at what rates?

(iii) Whether in the case of machine leads, lifts are not taken into account as pleaded by the Union of India?

(iv) Whether the claimant is entitled to the cost incurred in putting up the ramps?

(v) Is the Union of India estopped from denying liability for payment of lifts and machine leads for the reasons stated in paragraphs 11 to 14 of the Statement Claim of Kalunga Construction Co. (P) Ltd.?

(vi) Is the claimant entitled to interest for the period during which the amounts payable to the claimant remained unpaid by the Government if so, at what rate?

(vii) What is the amount due to the claimant from the Union of India?

6 A good deal of oral and documentary evidence was led by both the parties before the Arbitrator. After discussing the same he came to the following conclusion:

1 The tender must be taken to have been made and accepted on the basis

that the whole work was to be done by manual labour.

2. According to the terms of the contract if the average lead of 10 had to be exceeded the orders of the Chief Engineer in writing had to be obtained by the contractor and then the extra lead was to be paid at the rate of Rs. 1 · 12 As. per 1000 cubic feet. The company did raise the question of payment for lifts as early as 30th December, 1952, and sought the orders of the Chief Engineer in writing for the extra lead resulting from the conversion of lifts into leads but the Chief Engineer never made any order in writing. The arbitrator believed the evidence of the Chief Engineer Shri Kanwar Sain that he passed no orders allowing the Company an extension of lead beyond the average 10. As the obtaining of the written order of the Chief Engineer was an essential condition which had to be complied with before a claim for extra lead could be made the company was not entitled to payment for the extra leads beyond the average 10.

3. The letter Exhibit P-6, dated 30th March, 1953, which was signed by the Superintending Engineer for the Chief Engineer had not been proved to have been written either under the instructions of the Chief Engineer or approved by him. In this letter it was stated, *inter alia*, that the words "average 10 leads mentioned in the special conditions of the agreement include the initial lead and lift and all other lifts between the borrow area and the Dyke." The Chief Engineer's evidence relating to Exhibit P-6 was believed.

7. The final conclusion of the Arbitrator on issue No. 1 was that under the terms of the contract between the parties the rate of Rs. 45 per 1000 cubic feet covered all lifts and that lifts had not to be separately paid for. On issue No. 2 the company's claim for extra payment for machine leads was held to be untenable. The finding on issue No. 3 was that in a case of machine leads lifts were not to be taken into account. On issue No. 4 the arbitrator held that the company was not entitled to recover the costs incurred in putting up the ramps. On issue No. 5 it was decided that the Government was not estopped from denying liability for payment for lifts and machine leads. On issues 6 and 7 the

Arbitrator found that no amount was payable by the Union of India to the company nor was the Union liable to pay any interest.

8. The respondent-company filed what was called a plaint under sections 30 and 33 of the Indian Arbitration Act, 1940, in the Court of the Subordinate Judge, Sambalpur, challenging the award on various grounds and prayed that it be set aside. It was further prayed that another arbitrator be appointed to make a fresh award regarding the disputes between the parties. The Subordinate Judge set aside the award by his order, dated 17th March, 1962. The Union of India preferred an appeal to the High Court which was heard by Barman and Das, JJ. Learned Judges gave dissenting judgments. Barman, J., was of the view that the award could not be sustained whereas Das, J., was of the opinion that the award was not liable to be set aside. The appeal was then heard by a third Judge, G. K. Misra, J. On issues 1 and 2, Misra, J., agreed with the judgment of Barman, J., but on issues 3 and 4 he concurred with the decision of Das, J. According to his judgment the award could not be set aside on issues 3 and 4 whereas it was liable to be set aside on issues 1 and 2. As the issues were severable he set aside the award only on issues 1 and 2.

9. A bare perusal of the judgment of Misra, J., would show that he decided the matter as if he was entertaining an appeal against the award itself. He re-examined and re-appraised the evidence which had been considered by the Arbitrator and held that the arbitrator was wrong in coming to the conclusion that the work was contemplated by the contract to be done by manual labour alone. According to him under the agreement payment for machine leads was contemplated from the very beginning or at any rate was not excluded. He examined a large volume of evidence including Exhibit P-6 as also the oral evidence of the Chief Engineer Shri Kanwar Sain and held that from the course of correspondence it was clear that in dealing with the contractor or the Executive Engineer almost all the letters on behalf of the Chief Engineer were being dealt with by the Superintending Engineer. Once Exhibit P-6 was admitted to be genuine and was issued by the Superintending Engineer in the ordinary

course of correspondence it was for the appellant to establish by production of the relevant records that that letter had been issued without authority of the Chief Engineer Misra J, had no hesitation in holding that Exhibit P 6 was written under the authority of the Chief Engineer and was binding between the parties. Here again what Misra J, did was to appreciate the evidence which had been considered by the Arbitrator in particular, the testimony of the Chief Engineer. The Arbitrator had believed the statement of the Chief Engineer that Exhibit P 6 had neither been issued under his authority nor with his approval. Once this part of his statement was believed by the arbitrator it was not open to Misra J, to sit in appeal over the conclusion of the Arbitrator in proceedings for setting aside the award.

10 The other serious error into which Misra J, fell was to record a finding on the payment of extra leads beyond 10 in reversal of the conclusion of the Arbitrator. This is what the learned Judge proceeded to say

The next point for consideration is whether the payment for extra leads beyond 10 are to be rejected because the Chief Engineer's order in writing had not been obtained before the work involving additional leads was executed. Both under Exhibit P 2 and Exhibit P-69 this term had been incorporated. In the peculiar circumstances of this case however it must be taken that the condition had been fulfilled even though there was no order in writing. It was for the Executive Engineer and the Superintending Engineer who were getting the work done by the Company, to obtain the order in writing or not to allow the Company to work beyond 10 leads including lifts without obtaining the order of the Chief Engineer in writing.

Once it was found that under the terms of the contract the order of the Chief Engineer in writing had to be obtained before the work involving additional leads was executed and in the absence of any such written order it was not open to the Court to hold that the appellant—Union of India—was liable for payment of extra leads beyond 10

by applying some principle or rule analogous to estoppel. It is no doubt true that the company had been writing to the Engineering Department in the matter and that the latter did not, for a considerable time, send any reply but the company was debarred from asking for any additional payment in the absence of the Chief Engineer's order in writing. If the arbitrator came to that conclusion it could not be said that there was any error apparent in his award which would justify setting it aside.

11 For the reasons given above the appeal is allowed and the order of the High Court setting aside the award dated, 19th July 1959 in part as indicated in the Judgment of Misra J is hereby reversed. The proceedings instituted by the respondent under sections 30 and 33 of the Indian Arbitration Act, 1940, shall stand dismissed. In view of the entire circumstances the parties are left to bear their own costs in this Court.

V K ————— *Appeal allowed*

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — *J C Shah, K S Hegde and A N Grover, JJ*

The State of Punjab *Appellant**

v

Ramji Lal and others *Respondents*

(A) *Punjab Pre-emption Act (I of 1913) section 8 (2)—Notification by State Government under—Allegation that the notification was issued mala fide—Onus of proof—Held on facts that notification in the instant case was issued mala fide*

It cannot be contended that the plea that the action of the State was not *bona fide* cannot be said to be established unless the party alleging that case names the officer or officers guilty of conduct which justifies an inference that the official act was done for a collateral purpose. The law does not cast any such burden upon the party challenging the validity of the action taken by the State Government. The State Government has undoubtedly to act through its officers. What matters were considered, what

* C.A. No 1946 of 1966

matters were placed before the final authority, and who acted on behalf of the State Government in issuing the order in the name of the Governor, are all within the knowledge of the State Government and it would be placing an intolerable burden in proof of a just claim to require a party alleging *mala fides* of State action to aver in his petition and to prove by positive evidence that a particular officer was responsible for misusing the authority of the State by taking action for a collateral purpose. [Para. 9.]

The facts in the present case are eloquent. A sale deed was executed in favour of the defendants. The plaintiffs who claimed that they had a right to pre-empt the sale filed a suit and obtained a decree. On the finding of the High Court it is clear that except disclosing that the defendants intended to construct a factory on the land sold, nothing more was said. The State Government still proceeded to issue, in exercise of the power under section 8 (2) of the Punjab Pre-emption Act, a notification to exclude from the operation of the Act the land sold, as to defeat the right of pre-emption exercised by the plaintiffs in respect of which a decree was passed by the civil Court. The State Government has filed no affidavit explaining the circumstances in which the order came to be passed. Therefore the conclusion of the High Court that the impugned notification was issued *mala fide* was borne out by evidence and no ground is made out calling for interference with that conclusion in the present appeal by Special Leave.

[Para. 10.]

(B) *Punjab Pre-emption Act* (I of 1913), S. 8 (2)—*If infringes Article 14 of the Constitution of India* (1950)—(*Quaere.*) [Para. 6.]

Appeal by Special Leave from the Judgment and Order dated the 6th December, 1965 of the Punjab High Court in Civil Writ No. 1523 of 1962.

V. G. Mahajan, for Appellant.

Avad Behari, for Respondents Nos. 1 and 2.

The Judgment of the Court was delivered by

Shah, J.—On May, 1958, Khillu and two others sold a plot of land in village

Majesar, Tehsil Ballabgarh, District Gurgaon to Surinder Kumar and Virender Kumar (who will hereinafter be referred to as “the defendants”). On 9th January, 1959, Ramjilal and Khazan hereinafter called the “plaintiffs” filed a suit in the Civil Court to pre-empt the sale. On 16th November, 1961, the Government of Punjab issued in exercise of the power conferred by sub-section (2) of section 8 of the Punjab Pre-emption Act, 1913, a notification declaring “that no rights of pre-emption shall exist with respect to urban or village immovable property or agricultural land when purchased by any person for setting up or extension of any industry in the State with the permission of the Director of Industries, Punjab.”

2. The plaintiffs contended that the notification issued by the Government did not prejudicially affect their claim to pre-empt the sale. By order dated 16th February, 1962, the civil Court passed a decree for pre-emption conditionally on payment of the amount for which the property was sold. The civil Court found that the defendants had failed to establish that they intended to establish a factory on the land in question.

3. The defendants appealed to the Court of the Senior Subordinate Judge against the decree of the trial Court. Thereafter the Government of Punjab issued another notification on 3rd September, 1962, that the Governor of Punjab was pleased to order that “no right of pre-emption shall exist with respect to the sale of land, described in the Schedule to this Notification made on the 9th May, 1958, in favour of Messrs. Surinder Kumar and Virender Kumar, opposite Railway Station, Faridabad, for the establishment of a factory for manufacture of cork products”. In the Schedule was described the property sold to the defendants by Khillu and two others.

4. The plaintiffs then moved a petition in the High Court of Punjab challenging the validity of the notification dated 3rd September, 1962, among others on the ground that in issuing the order the Government acted *mala fide*. A Division Bench of the High Court referred the case for hearing before a Full Bench of the Court.

5 The Full Bench held that in a suit for pre-emption the claimant must prove that his right to pre-empt subsisted till the date of the decree of the first Court and that loss of the right after the date of the decree "by his own act or by an act beyond his control" did not affect his claim in the suit. Accordingly the notification under section 8 (2) of the Punjab Pre-emption Act, 1913 extinguishing the right of pre-emption in the property issued during the pendency of the appeal against the decree of the Trial Court did not disentitle the plaintiffs to maintain their claim of pre-emption already exercised and in respect of which a decree was granted to them. The High Court also held that section 8 (2) of Punjab Act I of 1913 did not offend Article 14 of the Constitution but the notification dated 3rd September 1962 was issued *mala fide* and was on that account 'liable to be struck down as invalid'. With Special Leave the State of Punjab has appealed to this Court.

6 It was urged that section 8 (2) infringes the guarantee of equality under Article 14 of the Constitution. In terms section 8 (2) provides

"The State Government may declare by notification that in any local area or with respect to any land or property or class of land or property or with respect to any sale or class of sales no right of pre-emption or only such limited right as the State Government may specify shall exist"

The High Court was of the view that section 8 must be read in the light of the scheme of the Act and especially section 9 which excludes from the operation of the Act sales made by or to Government or by or to any local authority, or to any company under the provisions of Part VII of the Land Acquisition Act 1894 or in respect of any sale sanctioned by the Deputy Commissioner under section 3 (2) of the Punjab Alienation of Land Act, 1900. The power conferred by section 8 (2) to declare by notification that to certain sales the Act will not apply is independent of the exemption which is statutorily prescribed by section 9. Exercise of the power under section 8 (2) is apparently not restricted to transactions of the nature specified

in section 9, but for the purpose of the present case we do not feel called upon to decide whether sub-section (2) of section 8 invests the State Government with "arbitrary, unguided and uncannalised power" so as to infringe the guarantee of Article 14 of the Constitution, for, in our view the plea that the order was issued *mala fide* raised by the plaintiffs and upheld by the High Court must be decided in their favour.

7 The High Court on a review of the evidence found it proved, that, although at some stage reference to the pre-emption suit filed by the plaintiffs appeared in the history of the case the defendants did not disclose the fact that a decree had been passed in favour of the plaintiffs, in the suit nor did any authority (except the Tehsildar) try to find out whether decree had been passed in that suit, that it was never brought to the notice of any authority by the defendants that the findings of the Trial Court was against them and it was because they had failed to prove that they intended to set up a factory, no authority ever tried to learn anything about that finding, that only a few days after the filing of the appeal by the defendants against the decree of the Trial Court an affidavit was filed by one of the defendants that they intended to put up a factory on the land in question, that the District Inspector of Industries at Gurgaon made a report in favour of the defendants, only on the basis that they had started building the boundary wall that the Tehsildar made a report adverse to the defendants, and pointed out that they had only constructed a small room in the middle of the land and not a factory building, that the move of the defendants was to stultify and defeat the decree, that the Deputy Commissioner first ordered that a copy of the report of the Tehsildar be forwarded to the Government, but two days later the Deputy Commissioner changed his mind when the defendants approached him and on the mere statement of the defendants that they intended to set up a factory in the land in question he proceeded to recommend that exemption notification under section 8 (2) of the Act be issued in favour of the defendants and that this was followed up by the higher authorities that the report

of the Tehsildar which had material bearing on the decision to be taken in the matter of issue of the impugned notification was suppressed and for this suppression there was no explanation "on the side of the State"; that although in the note dated 14th March, 1962 of the Joint Director of Industries, it was directed that the defendants were to sign an agreement that the exemption "to be granted to them would not be misutilised" and the land would "not be sold for money-making", and although in the Revenue Department's note of 14th August, 1962, it was stated that the Director of Industries be asked to obtain such an undertaking before the issue of the notification, no such agreement or undertaking was obtained from the defendants and all that was done was that on 8th November, 1962 (a day before the date of the notification and some days before its publication) another affidavit was obtained from the defendants that the land had been purchased for establishing a factory and "they solemnly undertook not to misuse or abuse the land", and declared and undertook that the land shall be used only for industrial purposes, but there was "no manner of contract by them whereby they would have to surrender back the land in the event of their not using it for the purpose of establishing a factory".

8. The High Court also observed that there was no allegation that any superior officer "in the Revenue Department such as the Secretary or the Deputy Secretary had acted in a *mala fide* manner in the issue of the impugned notification". But it was pressed before the Court that the notification was not really the act of one single person finally approving that the notification be issued: it was the result of a process of formal or informal inquiries and reports and consideration of various authorities at various stages leading up to the recommendations based on material collected which went to form the basis of the judgment whether or not such a notification should issue in any particular case. Approving of the process, the High Court observed that on a consideration of all the circumstances the impugned notification must be held to have been issued *mala fide*. The High Court concluded:

"The reason in the circumstances of this case is simple. In the first place the report of the Tehsildar was a crucial and vital document in this case, which would substantially and materially affect the approach of the higher authorities in the conclusion to issue or not to issue the notification. In this respect what happened before the Deputy Commissioner (Collector) had also the same bearing. It should have been disclosed what orders the Deputy Commissioner (Collector) passed first and what was the order which he passed two days later. An endeavour should have been made by somebody to find out what was the finding given by the Trial Court in the decision of that suit. This was not done even after the matter was pointed out by the Tehsildar. In other words, either deliberately or by sheer avoidance no effort was made to find out what finding the Trial Court had given in the matter * * * * In spite of it having been pointed out that before the issue of the notification an agreement be obtained from respondents 2 and 3 (the defendants) against misuse and misutilisation of the land for the purpose other than that for which it was being exempted from the right of pre-emption of the petitioners and for not making it an otherwise profiteering transaction, no such agreement, binding in law was obtained from these respondents (the defendants), but instead the matter was slurred over by obtaining a second affidavit from the two respondents (the defendants). It is thus apparent that at the final stages, when the question for consideration was whether or not the impugned notification should be issued, whether all the circumstances were present which justified the issue of such a notification and whether all the obligations that were required to be taken by respondents 2 and 3 (the defendants) had been taken before its issue, were matters which either could not be considered because substantial material collected was withheld or clear directions were completely ignored * * * In the circumstances of the case, to my mind, the impugned notification cannot be held to have been issued in good faith and has to be held to have been issued *mala fide*."

This is a finding based on appreciation of evidence and no case is made out which may justify us in interfering with that finding. It appears that the subordinate authorities withheld very important facts which had bearing on the issue of the notification by the State Government excluding the land sold under the sale deed dated 9th May 1958 executed by Khillu from the operation of the Punjab Pre-emption Act I of 1913 even after a decree was passed by the Civil Court granting pre-emption.

9 Counsel for the State of Punjab contended that the plea that the action of the State was not *bona fide* cannot be said to be established, unless the party alleging that case names the officer or officers guilty of conduct which justifies an inference that the official act was done for a collateral purpose, and since no such attempt was made and the High Court did not find that any named officer or officers was or were responsible for that official act the plea that it was (not) *bona fide* must fail. We do not think that the law casts any such burden upon the party challenging the validity of the action taken by the State Government. The State Government has undoubtedly to act through its officers. What matters were considered, what matters were placed before the final authority, and who acted on behalf of the State Government in issuing the order in the name of the Governor are all within the knowledge of the State Government and it would be placing an intolerable burden in proof of a just claim to require a party alleging *mala fides* of State action to aver in his petition and to prove by positive evidence that a particular officer was responsible for misusing the authority of the State by taking action for a collateral purpose.

10 The facts in the present case are eloquent. A sale deed was executed in favour of the defendants. The plaintiffs who claimed that they had a right to pre-empt the sale filed a suit against the defendants and obtained a decree. On the finding of the High Court it is clear that except disclosing that the defendants intended to construct a factory nothing more was said. The State Government still proceeded to issue in exercise of the power under section 8 (2) of the

Punjab Pre-emption Act, a notification to exclude from the operation of the Act the land so as to defeat the right of pre-emption exercised by the plaintiff in respect of which a decree was passed by the Civil Court. The State Government has filed no affidavit explaining the circumstances in which the order came to be passed. They have merely offered "comments" on the petition filed by the plaintiffs. In our judgments the conclusion of the High Court was borne out by evidence and no ground is made out calling for our interference with that conclusion in this appeal with Special Leave.

11 The appeal therefore fails and is dismissed with costs.

V K ——— Appeal dismissed

THE SUPREME COURT OF INDIA.

PRESENT —K S Hegde and A N Grover, JJ

Standard Refinery and Distillery Ltd.
Appellant*

v

Commissioner of Income-tax (Central)
Calcutta Respondent

Income tax Act (VI of 1922) section 24(2)
—Same business—Loss—Carry forward and set-off—Two businesses—Inter-connection—Inter-lacing—Inter-dependence—Unity—Tests—Common management—Common business organisation—Common administration—Common fund—Common place of business—Assessee-company owning a distillery, acquiring gur refining company, later—Purchase and sale of shares of lease company—Loss—Set-off against income of sugar business—Allowability

The assessee-company incorporated in 1942 owning a distillery at the beginning acquired a refinery in 1943 and with effect from 1945 obtained on lease a sugar and gur refining company. Between January, 1946 and April, 1946 the assessee purchased shares of the sugar and refining company and sold the entire block of shares in April, 1947, incurring loss for

the assessment year 1948-49. After set-off against the other income it was carried forward under section 24 (2) of the Act to the year 1949-50. The assessee claimed to set-off this unabsorbed loss pertaining to the share business against its profits in the sugar business for the assessment year 1949-50. Ultimately the Supreme Court in the appeal filed by the assessee, called for a supplementary statement from the Tribunal which found, that there was a single trading and profit and loss account, in the same account the sales of spirit, sugar and molasses as well as stock and shares appeared, that all the transactions were dealt with by a common organisation, that the sugar business and the transaction relating to the shares were attended to as part and parcel of the business of the assessee, that a common fund was utilised both for business purposes as well as for the purchase of shares, that part of an overdraft taken from the bank had been discharged from out of the income of the business and that all the transactions were carried on in the same place of business.

Held, the business of the assessee of dealing in shares and the business of manufacturing sugar and other commodities constitute the same business within the meaning of section 24 (2) of the Act. Certain objective tests for finding out the existence of inter-connection, inter-lacing, inter-dependence and unity between two or more businesses are furnished by the existence of common management, common business organisation, common administration, common fund and common place of business.

[Paras. 13, 22 and 25.]

On facts: the above tests were satisfied in the instant case.

Appeal from the Judgment and Order, dated the 23rd July, 1963, of the Calcutta High Court in Income-tax Reference No. 64 of 1958.*

Sachin Chaudhuri, Senior Advocate (O. P. Malhotra and D. N. Gupta, Advocates, with him), for Appellant.

Sukumar Mitra, Senior Advocate (T. A. Ramachandran and B. D. Sharma, Advocates, with him), for Respondent.

The appeal first came on for hearing before J.C. Shah, V. Ramaswamy and A. N. Grover, JJ.

The Judgment of the Court was delivered by

*Ramaswami, J.***—The assessee is a public limited company and the appeal relates to the assessment made for the assessment year 1949-50 corresponding to the accounting year which is the calendar year ending on 31st December, 1948. The assessee-company was incorporated in 1942. It was then owning and working a distillery at Unnao (U.P.) It acquired a refinery in 1943 and with effect from 1st June, 1945 obtained on lease the sugar factory belonging to the New Savan Sugar and Gur, Refining Co Ltd., and started manufacturing sugar. During the period from 29th January, 1946 to 23rd April, 1946 the assessee-company purchased 41,300 shares of the said New Savan Sugar and Gur Refining Co., Ltd., for Rs 12,17,006. On 30th April, 1947 the entire block of shares was sold to Produce Exchange Corporation Ltd., for Rs 8,46,750. The transaction resulted in a loss which was determined to be Rs. 3,70,356. This loss was treated by the assessee as a trading loss for the assessment year 1948-49. After setting off this loss against other income of the company a loss of Rs. 2,27,085 was carried forward under section 24 (2) of the Income-tax Act, 1922 (hereinafter called the Act) to the year 1949-50 and later years. The assessee claimed to set off this unabsorbed loss of Rs 2,27,085 pertaining to the share business against the profit of the sugar business for the assessment year 1949-50. The Income-tax Officer did not permit this set off of this loss under section 24 (2) of the Act. The Appellate Assistant Commissioner confirmed the order of the Income-tax Officer. On second appeal, the Appellate Tribunal rejected the claim of the assessee for set off under section 24 (2) of the Act. As directed by the High Court, the Appellate Tribunal stated a case under section 66 (2) of the Act on the following question of law :—

“Was there any evidence before the Tribunal on which it could hold that the business in dealing with shares was distinct and separate

* (1964) 1 I.T.J. 530.

** 6th February, 1969.

from the business of sugar manufacturing and distillery?"

2 By its judgment, dated 23rd July, 1963, the High Court answered the question in the affirmative against the assessee. The present appeal is brought by a certificate granted by the High Court under section 66 A (2) of the Act

3 Section 24 (2) of the Act stood as follows at the material time —

"Where any assessee sustains a loss of profits or gains in any year in any business profession or vocation and the loss cannot be wholly set off under sub section (1) so much of the loss as is not so set off or the whole loss where the assessee had no other head of income shall be carried forward to the following year and set off against profits and gains if any of the assessee from the same business profession or vocation for that year and if it cannot be wholly so set off the amounts of loss not so set off shall be carried forward to the following year and so on but no loss shall be so carried forward for more than six years"

4 The question whether on the application of the relevant legal tests, different ventures carried on by an individual or a company form the same business for the purpose of section 24 (2) of the Act is a mixed question of law and fact. Certain principles have been applied to determine whether on the facts found, a legal inference can be drawn that the different ventures constitute separate business or viewed together can be said to constitute the same business. These principles were stated by Rowlatt, J in *Scales v George Thompson & Co, Ltd*¹. The learned Judge observed as follows —

"the real question is, was there any inter-connection any inter lacing or any inter dependency any unity at all embracing those two businesses"

5 The learned Judge also observed that what one had to see was whether or not the different ventures were so inter laced and so dovetailed into each other as to make them into the same business. A similar view has been expressed by this Court in *Setabgany Sugar Mills Ltd v Commissioner of Income-tax Central Calcutta*², and it was pointed out that in answering this question a variety of

matters bearing on the unity of the businesses have to be examined, such as unity of control and management, conduct of the business through the same agency, the inter relation of the business, the employment of the same staff to run the business the maintenance of the same books of account, the nature of the different transactions the possibility of one being closed without affecting the texture of the other and so forth

6 In the present case however it is not possible for us to satisfactorily dispose of this appeal because the statement of the case submitted by the Tribunal is incomplete and has omitted to state material facts bearing upon the question referred. For instance it is not clear as to whether the assessee adduced any evidence as to why it started purchasing the shares of the lessor company about six months after the commencement of the lease. It is also not stated by the Tribunal whether there is any evidence of inter relation between the purchase of shares and the manufacture of sugar. As the statement of the case is unsatisfactory we think that the Tribunal should be directed to make a supplementary statement of case on the following points

(1) What is the nature and description of the refinery acquired by the assessee in 1943?

(2) What are the dates of commencement of various ventures carried on by the assessee company?

(3) What is the date of the commencement of the share business? Did the share business of the assessee company relate only to the shares of the lessor company or whether it related to shares of other companies?

(4) The articles of association of the assessee company and the memorandum should be made part of the case

(5) Was the manufacture of sugar by the assessee-company in any way benefited by the purchase of the shares of the lessor company?

(6) For what reason was the entire block of shares sold in April 1947 to the Produce Exchange Corporation?

1 (1927) 13 Tax Cases 83

2 (1961) 1 An W.R. (S.C.) 136 (1961) 1 M.L.J. (S.C.) 136 (1961) 1 S.C.J. 520 (1961) 2 S.C.R. 458 (1961) 41 I.T.R. 272 A.I.R. 1961 S.C. 360

7. We accordingly direct the Appellate Tribunal to submit a supplementary statement of case as expeditiously as possible. The appeal will again be placed for hearing after the supplementary statement of case is received. We should make it clear that the supplementary statement will be made only from the evidence already recorded.

8. After receipt of the supplementary of the case the appeal came on for hearing before *J. C. Shah, K. S. Hegde and A. N. Grover, JJ.*

A. K. Sen, Senior Advocate (*Gobind Das* and *D. N. Gupta*, Advocates, with him), for Appellant.

S. Mitra, Senior Advocate (*R. N. Sachthey* and *B. D. Sharma*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

*Shah, J.**—The Income-tax Appellate Tribunal referred the following question for opinion to the High Court of Calcutta under section 66 (2) of the Income-tax Act, 1922.

"Was there any evidence before the Tribunal on which it could hold that the business in dealing with shares was distinct and separate from the business of sugar-manufacturing and distillery?"

10. The High Court recorded their answer in the affirmative. The assessee appealed to this Court with certificate granted by the High Court under section 66-A (2) of the Income-tax Act, 1922. At the hearing of the appeal this Court was of the view that the statement of the case was insufficient to determine the question raised. The Court observed:

"In the present case however it is not possible for us to satisfactorily dispose of this appeal because the statement of the case submitted by the Tribunal is incomplete and has omitted to state material facts bearing upon the question referred. For instance, it is not clear as to whether the assessee adduced any evidence as to why it started purchasing the shares of the lessor company about six months after the commencement of the lease. It is also not stated by the Tribunal whether there is any evidence of inter-relation between the purchase of shares and the manufacture of sugar."

11. The Court ordered that the Tribunal be directed to submit the supplementary

statement of the case on the following points:

"1. What is the nature and description of the refinery acquired by the assessee in 1943?"

2. What are the dates of commencement of various ventures carried on by the assessee-company?"

3. What is the date of the commencement of the share business? Did the share business of the assessee-company relate only to the shares of the lessor company or whether it related to shares of other companies?"

4. The articles of association of the assessee-company and the memorandum be made part of the case.

5. Was the manufacture of sugar by the assessee-company in any way benefited by the purchase of the shares of the lessor company?"

6. For what reason was the entire block of shares sold in April 1947 to the Produce Exchange Corporation?"

The Tribunal has submitted a supplementary statement of the case and has annexed thereto the articles of association of the assessee. Even after considering those findings, we find ourselves unable to record our opinion on the question referred. We may observe that the question which the Tribunal was directed to and did refer was defective and restricted the scope of the enquiry. In our judgment, the question should have been in the following form:

"Whether the business of the company of dealing in shares and the business of manufacturing sugar and other commodities constitute the same business within the meaning of section 24 (2) of the Indian Income-tax Act, 1922, in force in the year of assessment?"

We re-frame the question accordingly.

13. As pointed out by this Court in *Commissioner of Income-tax, Madras v. Prithvi Insurance Company Ltd.*¹, in determining whether two lines of business constitute the "same business" within the meaning of section 24 (2) of the Income-tax Act, the Income-tax Authorities must consider the inter-connection, inter-lacung, inter-dependence and unity furnished by the existence of common management, common business organisation, common administration, common fund and a common place of business.

1. (1967) 1 I.T.J. 333 : (1967) 1 S.C.J. 400 : (1967) 1 An.W.R. (S.C.) 57 : (1967) 1 M.L.J. (S.C.) 57 : (1967) 1 S.C.R. 943 : (1967) 63 I.T.R. 632 : A.I.R. 1967 S.C. 853.

14 In the present case the statement of the case does not refer to the evidence relating to the existence or otherwise of inter-connection inter-lacing or inter-dependence between the two lines of business. There is no reference to the evidence about the method of management, the business organisation, the administration, the fund and the place of business in the statement of the case or even in the judgments of the income tax authorities. Since however a restricted question was framed it is probable that in submitting the statement of the case the Tribunal was misled into assuming that it was not necessary to set out the evidence relating to the management, business organisation, the administration, the fund and the place of business which may not have found place in the statement of the case.

15 In order to enable us to answer the question as re-framed we deem it necessary to direct that the Tribunal should state a case on the amended question in the light of the tests suggested by this Court in *Prithvi Insurance Company's case*¹. The Tribunal will submit the statement of the case within three months from the date on which the papers reach the Tribunal. We may state that the Tribunal will restrict itself to the materials on the record and will not allow fresh evidence to be led.

16 After receipt of the second supplementary statement of the case the appeal came on for hearing before *K S Hegde* and *A N Grover, JJ*.

S C Manchanda Senior Advocate (*Gobind Das* and *D N Gupta* Advocates, with him) for Appellant.

S Mitra, Senior Advocate (*S K Aiyar* and *R N Sachin* Advocates with him) for Respondent.

The Judgment of the Court was delivered by

Hegde, J—This is an assessee's appeal. The assessee is a public limited company and the appeal relates to the assessment for the assessment year 1949-1950 corresponding to the accounting year which is the calendar year ending on 31st December, 1948. The assessee company was incorporated in 1942. At the beginning it owned a distillery at Unnao. It acquired a refinery in 1943. With effect from 1st June, 1945, the assessee company obtained on lease the New Savan Sugar and Gur Refining Co. During the period from 29th January, 1946 to 23rd April 1946 the assessee company purchased 41,300 shares of the said company for Rs 12,17,006. On 30th April 1947 the entire block of shares was sold to Produce Exchange Corporation Ltd., for Rs 8,46,750. The transaction resulted in a loss of Rs 3,70,356. This loss was treated by the assessee as a trading loss for the assessment year 1948-49. After setting off this loss against the other income of the assessee company a loss of Rs 2,27,085 was carried forward under section 24 (2) of the Income tax Act, 1922 (to be hereinafter referred to as the Act) to the year 1949-50 and later years. The assessee claimed to set off this unabsorbed loss pertaining to the share business against its profits in the sugar business for the assessment year 1949-50. The Income tax Officer did not permit this set off. The Appellate Assistant Commissioner confirmed the order of the Income tax Officer. In a further appeal the Appellate Tribunal agreed with the conclusion reached by the Income-tax Officer. Thereafter at the instance of the High Court, the Appellate Tribunal stated a case under section 66 (2) of the Act on the following question of law

Was there any evidence before the Tribunal on which it could hold that the business in dealing with shares was distinct and separate from the business of sugar manufacturing and distillery?

18 By its judgment dated 23rd April 1963 the High Court answered the question in the affirmative and against the assessee. This appeal has been brought against the decision of the High Court after obtaining a certificate under section 66 (A) (2) of the Act.

19 The appeal came up for hearing before this Court on 6th February, 1969. After hearing the Counsel for the parties this Court observed

"In the present case however it is not possible for us to satisfactorily dispose of this

¹ (1957) 11 T.J. 333 (1957) 1 S.C.J. 400
(1957) 1 A.W.R. (S.C.) 57 (1957) 1 M.L.J. (S.C.) 57 (1957) 1 S.C.R. 443 (1957) 63 I.T.R. 632 A.I.R. 1957 S.C. 853

appeal because the statement of the case submitted by the Tribunal is incomplete and has omitted to state material facts bearing upon the question referred. For instance, it is not clear as to whether the assessee adduced any evidence as to why it started purchasing the shares of the lessor company about six months after the commencement of the lease. It is also not stated by the Tribunal whether there is any evidence of inter-relation between the purchase of shares and the manufacture of sugar."

20. In view of that conclusion this Court directed the Tribunal to submit a supplementary statement of case on some of the points formulated in the order.

21. The Tribunal accordingly submitted a supplementary statement of case. Even after considering that supplementary statement, this Court found itself unable to record its opinion on the question referred to. This Court was also of the opinion that the question which the Tribunal was directed to and did refer was defective and restricted the scope of the enquiry. It accordingly reframed the question as follows :

"Whether the business of the company of dealing in shares and the business of manufacturing sugar and other commodities constitute the same business within the meaning of section 24 (2) of the Indian Income-tax Act, 1922, in force in the year of assessment ?"

22. It further directed the attention of the Tribunal to the decision of this Court in *Commissioner of Income-tax, Madras v. Prithvi Insurance Co., Ltd.*,¹ in order to assist the Tribunal to find out the relevant points for consideration. In the order calling for a further supplementary statement, this Court observed :

"As pointed out by this Court in *Commissioner of Income-tax, Madras v. Prithvi Insurance Co. Ltd.*¹, in determining whether two lines of business constitute the 'same business' within the meaning of section 24 (2) of the Income-tax Act, the income-tax authorities must consider the inter-connection, inter-lacing, inter-dependence and unity furnished by the existence of common management, common business organisation, common administration, common fund and a common place of business."

23. The Tribunal has now submitted the second supplementary statement of case called for by this Court. The facts found by it are as follows :—

(1) There is a single trading and profit and loss account. In the same account the sales of spirit, sugar and molasses as well as stock and shares appear ;

(2) The share transactions as well as the business has been dealt with by a common organisation, though the sale of shares is a single transaction and the purchase of those shares is also more or less of the same character ;

(3) The business of the company as well as the transaction relating to the shares were attended to as part and parcel of the business of the assessee-company ;

(4) A common fund was utilised both for business purposes as well as for the purchase of shares. A part of the overdraft of Rs. 6,80,046 taken from the bank on 31st December, 1947 has been discharged from out of the income of the business ; and

(5) The share transaction work as well as the other business of the assessee-company were carried on in the same place of business.

24. From the facts found by the Tribunal, it is clear that the share transaction as well as the other businesses of the company were dealt with by a common management, common business organization, common administration, common fund and common place of business.

25. It was urged by Mr. Mitra, learned Counsel for the Revenue that from the facts found by the Tribunal, it is not possible to conclude that there was any inter-connection, inter-lacing, inter-dependence and unity between the transactions of the assessee-company relating to the shares as well as its other business and therefore the two activities cannot be considered as "the same business". He contended that this Court in *Prithvi Insurance Co. Ltd.* case¹, has accepted the correctness of the decision of the King's Bench in *Scales v. George Thompson & Co., Ltd.*² and in that case Rowlatt, J., had held that before two or more businesses can be considered as "the same business" they should not be easily separable and there must be a dovetailing of the one with the other. According to

1. (1967) 63 I.T.R. 632 : (1967) 1 I.T.J. 333 : (1967) 1 S.C.J. 400,

1. (1967) 1 I.T.J. 333 ; (1967) 1 S.C.J. 400.
2. (1927) 13 Tax Cases 83,

Mr Mitra the transactions relating to the shares could have been easily separated from the other business of the company and therefore there is no inter connection, equally there is no inter lacing because the share transaction business does not dovetail itself into the other business of the assessee company. Further there is neither inter dependence or unity between the two businesses. The concept of inter connection and inter lacing inter dependence and unity are not free of ambiguity. But this Court has laid down certain objective tests for finding out the existence of inter connection inter lacing inter dependence and unity between two or more businesses. In *Commissioner of Income tax Madras v Prithvi Insurance Co Ltd*¹ this Court ruled that inter connection inter lacing inter dependence and unity were furnished by the existence of common management, common business organisation common administration, common fund and a common place of business. This conclusion was reiterated by this very bench in *Produce Exchange Corporation Ltd v Commissioner of Income tax (Central Calcutta)*². There the assessee company carried on business as a dealer in diverse commodities and also stock and shares. In the year of account 1949, it had suffered loss of Rs 3,71,700 in the sale of shares which the company claimed to carry forward and set off against the profits of subsequent years from transactions in other commodities. The Tribunal found that there was complete unity of control and shares were one of a number of commodities in which the company dealt in the ordinary course of business and that there was no element of diversity or distinction or separateness about the transaction in shares and accordingly upheld the claim. On a reference the High Court held that the essential matter to be considered was the nature of the two lines of business and not merely their unity of control and that therefore the Tribunal erred in holding that the whole trading activity formed one business. Reversing the decision of the High Court this Court ruled that the decisive test was unity of control and not the nature of the two lines of business.

26 For the reasons mentioned above we allow this appeal, discharge the answer given by the High Court and answer the reframed question in the affirmative and in favour of the assessee. The Revenue shall pay the costs of the assessee both in this Court and in the High Court.

V S ——— Appeal allowed

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT —J C Shah, K S Hegde and A N Grover JJ

M/s Prabhat General Agencies, etc
Appellants*

v

Union of India and another
Respondents

Arbitration Act (X of 1940), section 8 (1) (b)—Scope —When attracted

Before section 8 (1) (b) of the Arbitration Act can come into operation it must be shown that (1) there is an agreement between the parties to refer the dispute to arbitration, (2) that they must have appointed an arbitrator or arbitrators or umpire to resolve their dispute, (3) anyone or more of those arbitrators or umpire must have neglected or refused to act or is incapable of acting or has died, (4) the arbitration agreement must not show that it was intended that the vacancy should not be filled and (5) the parties or the arbitrators, as the case may be, had not supplied the vacancy.

[Para 5]

The only question in the present case is whether the agreement read as a whole shows either explicitly or implicitly that the parties intended that the vacancy that should not be supplied. It may be noted the language of the provision is not 'that the parties intended to supply the vacancy' but on the other hand it is that the parties did not intend to supply the vacancy. In other words if the agreement is silent as regards supplying the vacancy the law presumes that the parties intended to supply the vacancy. To take the case

1 (1967) 1 I.T.J. 333 (1967) 1 S.C.J. 400
2 (1970) 77 I.T.R. 739 (1971) 1 I.T.J. 50
(1971) 1 S.C.J. 94

*CAs Nos 1961 to 1963 of 1966
12th October, 1970

out of section 8 (1) (b) what is required is not the intention of the parties to supply the vacancy but their intention not to supply the vacancy. The agreement in the present case do not in the least show that the parties intended not to supply the vacancy. Merely because the arbitrator was designated with reference to the office held by him, it could not be inferred that the parties intended not to supply the vacancy.

[*Paras. 6, 7, 8.*]

Bharat Construction Co., Ltd. v. Union of India, A.I.R. 1954 Cal. 606 and *District Co-operative Federation Ltd. v. Khub Chand*, A.I.R. 1961 H.P. 35, Overruled.

[*Paras. 14, 16.*]

Appeal by Special Leave from the Order, date the 27th October, 1965 of the Judicial Commissioner's Court, Himachal Pradesh at Simla in Civil Revision Nos. 16 to 18 of 1965.

Bishan Narain, Senior Advocate (*B. Datta* Advocate, and *J. B. Dadachani & Co.*, Advocates, with him), for Appellant (in C.A. No. 1961 of 1966).

B. Datta, Advocate and *J. B. Dadachani & Co.*, Advocates, for Appellants (in C. As. Nos. 1962 and 1963 of 1966).

V. C. Mahajan, Advocates, for Respondents (In all the appeals).

The Judgment of the Court was delivered by

Hegde, J.—These appeals by Special Leave raise a common question of law. Therefore they can be dealt with together. The appellants herein entered into agreements with the Union of India under which they were allotted certain areas in a forest to tap Resin Blazes and supply the same to the Turpentine Factory at Sirmur. The agreements entered into included an arbitration clause. That clause is common in all the three agreements. That clause reads thus :

“If any question, difference or objection whatsoever shall arise in any way connected with or arising out of this or the meaning or operation of any part thereof or the rights dues or liabilities of either party, then save in so far as the decision of any such matter is hereinbefore provided for and

has been so decided, every such matter including whether its decision has been otherwise provided for and whether it has been finally decided accordingly or whether the contract should be terminated or has been rightly terminated and as regards the rights and obligations of the parties as the result of such termination shall be referred for arbitration to the Judicial Commissioner, Himachal Pradesh, and his decision shall be final and binding and where the matter involves a claim for or the payment or recovery or deduction of money, only the amount, if any awarded in such arbitration shall be recoverable in respect of the matter so referred.”

2. The parties are agreed that no other clause in the agreements is relevant for our present purpose. Disputes arose between the appellants and the respondents in respect of some claims arising from the said contracts. The appellants requested the respondents to refer the disputes to the arbitration of the Judicial Commissioner, Himachal Pradesh. The respondents declined to agree to make the reference in question. Thereafter the appellants moved the Senior Sub-Judge, District Sirmur Nahan under section 20 of the Indian Arbitration Act, 1940 (to be hereinafter referred to as the Act) for ordering the respondents to file the agreements in question in his Court and for referring the disputes to the Judicial Commissioner, Himachal Pradesh for arbitration. The learned Sub-Judge accepted these applications and directed the respondents to file the agreements in question into his Court. Thereafter he referred the disputes to the arbitration of the Judicial Commissioner, Himachal Pradesh. The Judicial Commissioner, in our opinion rightly declined to act as an arbitrator. Thereafter the learned subordinate Judge was moved to appoint some other arbitrator in place of the Judicial Commissioner. The respondents, opposed that prayer on the ground that arbitration clause did not provide for such an appointment. The learned Subordinate Judge accepted that contention and dismissed the applications. As against that decision the appellants went up in revisions to the Judicial Commissioner, Himachal Pradesh. The

Judicial Commissioner following an earlier decision of that Court in *District Co operative Federation Ltd v Khub Chand*¹, dismissed the revision petitions holding that under the agreements no reference for arbitration can be made to anyone other than the named authority. The question for decision is whether the interpretation placed by the Courts below on the relevant provision in the arbitration agreements is correct.

3 It may be noted that the agreements in these appeals relate to the exploitation of certain forest produce. The disputes that have arisen between the parties are not of technical nature requiring any specialised knowledge on the part of the arbitrator. It is clear from the terms of the agreements that the Judicial Commissioner was not appointed as an arbitrator because of any special or technical knowledge possessed by him relating to the subject matter of the dispute. Evidently he was appointed though in our opinion quite improperly arbitrator because he was a high judicial officer.

The relevant provisions of the Act which bear on the point under consideration are sections 8 (1) and 20 (4) of the Act. Section 8 (1) reads

'Power of Court to appoint arbitrator or umpire—In any of the following cases—

(a) where an arbitration agreement provides that the reference shall be to two or more arbitrators to be appointed by consent of the parties and all the parties do not after differences have arisen concur in the appointment or appointments, or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be filled and the parties or the arbitrators as the case may be do not supply the vacancy,

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him

any party may serve the other parties or the arbitrators as the case may be

with a written notice to concur in the appointment or appointments or in supplying the vacancy'

4 Section 20 reads thus

"(1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject matter of the agreement or any part of it and where a difference has arisen to which the agreement applies they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants if the application has been presented by all the parties, or, if otherwise between the applicant as plaintiff and the other parties as defendants

(3) On such application being made the Court shall direct notice thereof to be given to all the parties to the agreement other than the applicants requiring them to show cause within the time specified in the notice why the agreement should not be filed

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise or, where the parties cannot agree upon an arbitration to an arbitrator appointed by the Court

(5) Thereafter the arbitration shall proceed in accordance with and shall be governed by the other provisions of this Act so far as they can be made applicable'

5 Section 20 is merely a machinery provision. The substantive rights of the parties are found in section 8 (1) (b). Before section 8 (1) (b) can come into operation it must be shown that (1) there is an agreement between the parties to refer the dispute to arbitration, (2) that they

must have appointed an arbitrator or arbitrators or umpire to resolve their dispute; (3) anyone or more of those arbitrators or umpire must have neglected or refused to act or is incapable of acting or has died; (4) the arbitration agreement must not show that it was intended that the vacancy should not be filled and (5) the parties or the arbitrators as the case may be had not supplied the vacancy.

6. In the cases before us it is admitted that there is an agreement to refer the dispute to arbitration. It is also admitted that the parties had designated the Judicial Commissioner of Himachal Pradesh as the arbitrator for resolving any dispute that may arise between them in respect of the agreement. The Judicial Commissioner had refused to act as the arbitrator. The parties have not supplied that vacancy. Therefore the only question is whether the agreement read as a whole shows either explicitly or implicitly that the parties intended that the vacancy should not be supplied. It may be noted that the language of the provision is not 'that the parties intended to supply the vacancy' but on the other hand it is that 'the parties did not intend to supply the vacancy.' In other words if the agreement is silent as regards supplying the vacancy, the law presumes that the parties intended to supply the vacancy. To take the case out of section 8 (1) (b) what is required is not the intention of the parties to supply the vacancy but their intention not to supply the vacancy. We have now to see whether the agreements before us indicate such an intention.

7. As mentioned earlier the only relevant provision in the agreements before us is the provision relating to arbitration. The other provisions in the agreements do not throw any light as regards the intention of the parties. We have earlier mentioned that the Judicial Commissioner, Himachal Pradesh, could not have been appointed as the arbitrator for any specialised knowledge possessed by him relating to any dispute that may arise under the agreement. What the Judicial Commissioner could have competently done if he had acted as an arbitrator could certainly be done by an independent and impartial person possessing adequate knowledge of law. In our opinion the language of section

8 (1) (b) is plain and unambiguous and the terms of the agreement before the us do not in the least show that the parties intended not to supply the vacancy.

8. The Judicial Commissioner as well as the learned Subordinate Judge erred in thinking that merely because the arbitrator was designated with reference to the office held by him, it should be inferred that the parties intended not to supply the vacancy. Evidently the parties did not mention the name of any particular Judicial Commissioner as arbitrator because there may be a change in the personnel. The appointment of Judicial Commissioner as arbitrator by itself does not afford any indication that the parties to the agreement intended not to supply the vacancy if the Judicial Commissioner refused to act or is incapable of acting.

9. In *Governor-General in Council v. Associated Live Stock Farm (India) Ltd.*¹, the arbitration clause that came to be considered by the Court read as follows :

"Any dispute or difference arising out of the contract, settlement of which is not hereinbefore provided for, shall be referred to the arbitration of the officer sanctioning the contract whose decision shall be final and binding."

10. Interpreting that clause read along with other clauses in the arbitration agreement Das, J, (as he then was) observed :

"I do not find anything in the arbitration clause suggesting that the parties agreed that any vacancy in the office of arbitrator should not be filled up. In the absence of any such agreement the vacancy can be easily supplied and there is no reason to think that the arbitration will be infructuous at all. If the particular officer sanctioning the contracts refuses to act or is incapable of doing so by reason of his absence or otherwise there are provisions in the Arbitration Act for the appointment of another arbitrator in his place and the arbitrator so appointed will be quite competent to proceed with the arbitration."

1. I.L.R. (1948) 1 Cal. 161.

11 In *Union of India v Raj Narain Misra*¹ S R Dass Gupta J (as he then was) held that in the absence of an indication in the agreement against supplying any vacancy in the office of the arbitrator and in view of the provision in section 8 of the Arbitration Act 1940 for supplying a vacancy the agreement for arbitration cannot become infructuous due to a vacancy

12 In *Fertiliser Corporation of India Ltd v M/s Domestic Engg Installation*² a Division Bench of the Allahabad High Court laid down that a perusal of clause (4) of section 20 of the Act indicates that there are three courses open to the Court under that provision of law. After the arbitration agreement has been ordered to be filed the Court shall proceed to make a reference firstly to the arbitrator appointed by the parties in the agreement secondly to the arbitrator not named in the agreement but with regard to whom the parties agree otherwise, and thirdly when the parties cannot agree upon an arbitrator to an arbitrator appointed by itself

13 The respondents in support of their case that the vacancy could not be filled up relied on the decision of the Rajasthan High Court in *Chief Engineer Buildings and Roads Jaipur and another v Hurbans Singh*³. Therein Wanchoo, C J (as he then was) after referring to the various clauses in the agreement and particularly to the clause which said that the Chief Engineer shall be the sole arbitrator and judge in case of dispute, came to the conclusion that the parties to the agreement intended that the vacancy should not be filled up if the Chief Engineer refused or failed to act. The said decision turned on the facts of that case. The learned judges who decided that case came to conclusion by reference to the various clauses in the agreement that the parties to the agreement intended not to supply the vacancy. Hence this decision is clearly distinguishable

14 Reliance was next placed by the respondents on the decision of the Division Bench of the Calcutta High Court in

*Bharat Construction Co Ltd v Union of India*¹. Therein Chakravarti C J, speaking for the Court, opined that it is doubtful whether clause (b) of section 8 (1) of the Arbitration Act at all applies to a case where a named arbitrator, obviously chosen for the possession of qualifications special to him, has become unavailable or refused to act, but any way the applicability of that clause in a particular case must be determined by the test laid down in the section itself. The test is that the arbitration agreement must not show that it was intended that the vacancy should not be supplied, in other words however individual the original choice may appear to be, if the agreement itself contains sufficient indication that the parties nevertheless intended that in default of their original nominee they would be prepared to fill up the vacancy by choosing another arbitrator the section will apply and a new appointment may be made either by the parties or by the Court as the case may be

15 In our opinion the learned Judge while approaching the question from a correct angle fell into the error of thinking that the agreement must indicate that the parties intended to fill up the vacancy. That is not what section 8 (1) (b) says. What that section says is that 'the arbitration agreement does not show that it was intended that the vacancy should not be supplied'

16 Reference was next made to the decision of the Judicial Commissioner, Himachal Pradesh in *District Co-operative Federation Ltd's case*². Therein the learned Judge purporting to follow the decision in *Hurbans Singh's case*³ held that it may reasonably be assumed that the way arbitrator is appointed by the parties with reference to the office the intention is that the arbitration should be conducted by the holder of that office and by none else, and on refusal of such an arbitrator to act, the Court has no power to appoint another in his place. The learned Judge, in our opinion, has misunderstood the decision of the Rajasthan High Court and the principles of law enunciated by him are not borne out by the provisions of section 8 (1) (b)

1 LL.R. (1952) 1 Cal 342

2 A.I.R. 1970 Ail 31

3 A.I.R. 1955 Raj 30

1 A.I.R. 1954 Cal 606

2 A.I.R. 1961 Him. Pra 35

3 A.I.R. 1955 Raj 30

17. Lastly reference was made on behalf of the respondents to the decision of the Punjab High Court in *M/s. Isher Dass Sahni & Bros. v. Union of India and others*¹ wherein one of us (Grover, J.) after referring to the various decisions rendered under section 8 (1)(b) and section 20 (4) of the Act and noticing the conflict of the judicial opinion rejected the revision petition solely on the ground that he would not be justified in the exercise of his revisional powers in setting aside the view taken by the lower Court. In fact in the course of his judgment he observed :

“If the matter were *res integra*, I might have agreed with one view or the other but in my opinion the Court below has on a consideration of the material facts and relevant law come to the conclusion that the arbitration agreement in question showed that there was no intention to fill up the vacancy. I would not be justified in revision in setting aside that finding even if I was disposed not to concur with the decision of the trial Court on this point.”

18. For the reasons mentioned above we allow these appeals, set aside the orders passed by the Subordinate Judge as well as by the Judicial Commissioner and remit the cases to the trial Court for appointing a new arbitrator in place of the Judicial Commissioner, Himachal Pradesh. The respondents shall pay the costs of the appellants both in this Court as well as in the Courts below.

V.K.

*Appeals allowed;
matter remitted.*

THE SUPREME COURT OF INDIA. (Civil Appellate Jurisdiction)

PRESENT :—J. C. Shah, G. K. Mitter, K. S. Hegde, A. N. Grover and A. N. Ray, JJ.

State of Mysore and others etc.
Appellants.*

v.

M/s. D. Cawasji & Co. etc. Respondents.

Mysore Elementary Education Act (VI of 1941), as amended by the Mysore Elementary Education (Amendment) Act (1955), section 9 and Schedule—Levy of education cess on ‘shop-rent’—Validity—Conditions of auction of license to vend toddy etc.—If creates liability.

‘Shop rent’ is not excise duty within the meaning of Entry 51 of List II of the 7th Schedule to the Constitution of India. and is accordingly not excise revenue within the meaning of the Schedule to the Mysore Elementary Education Act, 1941 as amended in 1955, and therefore no education cess could be levied on ‘shop-rent’ [Para. 10.]

The liability to pay ‘cess’ is statutory; if the statute does not effectuate the levy no liability to pay the cess may arise merely from the conditions of the auction. [Para. 12.]

Appeals from the Judgments and Orders, dated the 2nd May, 1968 and 8th January, 1969 of the Mysore High Court in Writ Petitions Nos 1096 of 1966, etc.

M. C. Chagla, Senior Advocate, R. Gopalakrishnan and S. P. Nayar, Advocates, with him, for the Appellants (In all the Appeals).

M. C. Setalvad, Senior Advocate, B. Datta and P. N. Tewari, Advocates, and (M/s J. B. Dadachanji & Co., Advocates, with him), for Respondent No. 1 (In C.A. Nos. 179, 180, 183, 193 and 194 of 1969).

M. K. Nambiar, Senior Advocate, K. N. Bhatt, S. Shivaswamy and K. L. Hathi, Advocates, with him, for the Respondents (In C.As Nos. 181, 182, 203, 209 to 213 and 223 to 226 of 1969).

S. Shivaswamy, K. N. Bhatt and K. L. Hathi, Advocates, for the Respondent (In C.A. No. 195 of 1969)

*C As. Nos. 179 to 235 of 1969 and 130 to 133 of 1970. 18th November, 1970.

R V Pillai and P Kesava Pillai, Advocates for the Respondents (In C.As Nos 186 to 188 and 198 to 202 of 1969) *Mrs Shyamala Pappu, J Ramamurthy and Vineet Kumar* Advocates for the Respondents (In C.As Nos 214 to 220 of 1969)

M Veerappa, Advocate for the Respondents (In C.As Nos 130 and 133 of 1970)

The Judgment of the Court was delivered by

Shah J—Under the Mysore Excise Act, 1901, the Government of the State was authorised to grant exclusive privilege of selling by retail Indian made liquor on such conditions and for such period as the Government deemed fit, and to levy duty on manufacture and sale of alcoholic liquor. In exercise of that power the Government of Mysore framed rules regulating sale of "excise privileges". In the Note to rule 23 in respect of *toddy* "tree tax", "tree rent" and "shop rent" were chargeable at the rate of 9 pies per rupee

2 Under the Act the exclusive privilege of retail vending of *toddy* in different areas was sold by auction. Every licensee had to secure *toddy* by tapping *toddy* yielding trees either in Government groves assigned to his shops or trees of private ownership. The licensee was required to pay to the State "tree tax" at the prescribed rates for the number of trees tapped by him. When he tapped trees belonging to the Government he had to pay in addition "tree-rent" to the State. Consideration paid by the licensee to the State for the exclusive privilege of retail vending of *toddy* or *arrack* or beer was popularly known as *shop rent*. In the notifications inviting bids or tenders for the exclusive privilege of retail vending of *toddy*, *arrack*, and beer it was stipulated that education cess shall be paid in accordance with Condition 23 of the General Conditions applicable to all excise licences.

3. Originally the Government used to charge *shop-rent*, "tree tax" and "tree rent" separately. But in 1907 a notification was issued abolishing separate levies of "tree tax" and "tree-rent". The Mysore Revenue Manual (1938) Edn, Vol 1, at page 334 read as follows

"Formerly, the local cess was being

levied on the following items —

(i) * * * * *

(ii) *Toddy*—both date and *bagan*

(iii) * * * * *

But in the marginal note dated G.O. (F.I., 9243 54 S.R. 14506 I, dated 16th June 1907) the following directions have been given —

(a) The separate levy of local cess on tree tax is abolished and the cess at present levied merged in the main item, the rates of tree tax on the various kinds of trees being as follows —

* * * * *

(b) Levy of a local cess on *toddy* shop rental is also abolished,

(c) The cess on tree rent is merged in the main item itself

N.B.—1/17th of the tree tax the shop rental and tree rent collected should be credited to Local Funds in lieu of the one anna cess formerly levied on these items

(Vide also Article 41—Mysore Accounts Code, Vol 1)

After the merger of a part of the Bellary District pursuant to the setting up of the State of Andhra in 1953 in the Mysore Excise Act 1901 was extended to the Bellary Area so merged in 1955

4 The Mysore Excise Act, 1901 was repealed and replaced by the Mysore Excise Act 1965. But no substantial alteration was made in the scheme of levy of excise revenue under the new Act

5 Under the Mysore Elementary Education Act 1941 an education cess was levied as a percentage *inter alia* of excise revenue. The Mysore Elementary Education Act, 1941, was not extended to the Bellary Area and the excise contractors in that area were not liable to pay education cess. The Mysore Elementary Education Act, 1941 was replaced by the Mysore Compulsory Education Act 1961. By section 25 of that Act Chapters VI and VII of the 1941 Act were repealed and the rest of the 1941 Act continued to remain in force in the old Mysore Area. Accordingly, section 9 of the 1941 Act which occurred in Chapter III under which education cess was levied remained in operation

Section 9 (1) of the Mysore Elementary Education Act, 1941, as amended by the Elementary Education (Amendment) Act, 1944 read as follows :

"The Government may, for carrying out the purpose of this Act, levy throughout or in any part of Mysore, an education cess on any or all of such items of State revenue or of tax levied under any Act, or rule constituting local bodies in Mysore and at such rates as are specified in the Schedule to this Act."

After the Mysore Elementary Education (Amendment) Act, 1955, the relevant provision of the Schedule read as follows :

<i>Items on which cess may be levied.</i>	<i>Maximum rate of levy</i>
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All items of land revenue, forest revenue and excise revenue on which education cess is now being levied.	9 pies in the rupee."
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The Government of Mysore levied the "education cess" from excise contractors in the old Mysore Area of the new State of Mysore. From time to time large amounts were collected by the Government of Mysore.

6. A large number of excise contractors moved petitions under Article 226 of the Constitution before the High Court of Mysore challenging the levy of "education cess" on "shop-rent" in respect of *toddy*, *arrack* and beer and on "tree-tax" and "tree-rent". They claimed a declaration that they were not liable to pay the "education cess" and an injunction restraining the State from levying and collecting the education cess and also for an order refunding the amount already collected.

7. It appears that even after the notification of 1907 merging the "tree-tax" and "tree-rent" with the "shop-rent" was issued, the State was in fact collecting the education cess from the excise contractors. In the view of the High Court under the Schedule as amended by the Mysore Elementary Education (Amendment) Act, 1955, liability to pay education cess arose in respect of all items of excise revenue on which education cess was being levied and since no education cess was being lawfully levied in the year 1955 and for a long time

before that year, the liability to pay education cess did not arise. They held that the expression "now being levied" used in the Schedule as amended meant "now being lawfully levied". By virtue of Article 265 of the Constitution no tax could, they observed, be levied or collected except by authority of law : if there was no authority of law, collection of the education cess under the amended Schedule could not authorise collection of the education cess. The High Court observed that the Schedule to the Education Act was amended after the commencement of the Constitution and it was reasonable to impute to the State Legislature not merely knowledge of, but also anxiety to comply with Article 265 of the Constitution. and that was clear from the fact that neither the original Education Act nor the Amending Act of 1955 contained any provisions for validating any levy or collection made without the authority of law. Accordingly the High Court held that the State was incompetent to levy the education cess because it did not fall within the charging provision. After expressing that opinion the High Court proceeded to interpret the Schedule and held that the Education Act does not impose the charge of education cess on *arrack* "shop-rent", *toddy* "shop-rent" and beer "shop-rent", "tree-tax" and "tree-rent" and that "shop-rent" is not a duty of excise and hence education cess cannot be levied on *arrack* "shop-rent", *toddy* "shop-rent" or beer "shop-rent". The High Court also held that the excise contractors may question the validity of the levy of education cess on "shop-rent", "tree-tax" and "tree-rent" even if they had agreed to pay education cess on those items. The High Court declared the levy of education cess on *toddy*, *arrack* and beer "shop-rent", "tree-tax" and "tree-rent" as invalid. The State of Mysore has appealed to this Court with certificate granted by the High Court.

8. Mr. Chagla contended that under List II, Entry 8, the State Legislature is competent to legislate for levy of cess in respect of "intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors." Legislative power normally includes all incidental and subsidiary powers, but the power to tax is

neither incidental nor subsidiary to the power to legislate on a matter or topic *M P V Sundaramier & Co v The State of Andhra Pradesh and another*¹ Entries in Lists I and II in Schedule VII dealing with certain specific topics do not grant power to levy tax on transactions relating to those topics. Power to tax must be derived from a specific taxing entry. Tax could therefore not be levied on intoxicating liquors relying upon Entry 8, List II.

9 Entry 51, List II, authorises the State Legislature to legislate for— Duties of excise on the following goods manufactured or produced in the State and counter-vailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India —

(a) alcoholic liquors for human consumption

(b) opium, Indian hemp and other narcotic drugs and narcotics but

* * * * *

The taxing power in respect of alcoholic liquors for human consumption is therefore circumscribed. It may only be levied as excise duty that is a duty levied on the manufacture and production of alcoholic liquors. *R C Jall v Union of India*²

10 Mr Chagla for the State urged that the High Court was in error in holding that 'shop-rent' was not excise revenue. But this question is concluded by a judgment of this Court. In *M/s Guruswamy & Company v State of Mysore and others*³ this Court held that the Mysore State Legislature was incompetent to levy health cess on the items of the State excise revenue. The Court further held that the levy of health cess could only be made if it be shown that the duty had been levied on goods which had been produced or manufactured, the taxable event being production or manufacture of goods. The Court observed that the essential characteristics of an excise duty was uniformity of incidence and that the duty must be closely related to production or manufacture of goods. It did not matter if the levy was made not at the moment of production or manufacture but at a later

stage. If a duty had been levied on an excisable article but the duty was collected from a retailer it did not necessarily cease to be an excise duty. If a levy was made for the privilege of selling an excisable article and the excisable article had already borne the duty and the duty had been paid, there must be clear terms in the charging section to indicate that what was being levied for the purpose of the privilege of sale was in fact a duty of excise. The Court further held that a payment for the exclusive privilege of selling *toddy* from certain shops was called 'shop rent'. The licensee paid what he considered to be equivalent to the value of the right and it had no relation to the production or manufacture of *toddy*, and that the 'shop rent' was not excise duty within the meaning of Entry 51 of List II of the Constitution. We are bound by this judgment. "Shop rent is accordingly not excise revenue within the meaning of the Schedule to the Mysore Elementary Education Act 1941 and no education cess could be levied on 'shop-rent'".

11 Mr Chagla however contended that in any event the State is entitled to levy "tree tax" and 'tree-rent' at the rates prescribed. It is unnecessary for the purpose of this case to determine whether 'tree tax' and "tree-rent" are excise revenue within the meaning of the Schedule to the Mysore Elementary Education Act. Granting the "tree tax" and "tree rent" are excise revenues, those imposts ceased to be levied separately after the year 1907 they merged in 'shop-rent' and a fixed percentage was regarded as local cess and diverted to the local bodies. If under the order of 1955 and before that date education cess on 'tree tax' and 'tree rent' was not being levied lawfully liability to pay tree tax and "tree-rent" could not be enforced by the State against the excise contractors.

12 Mr Chagla also urged that even if education cess on "shop-rent" is not within the competence of the State Legislature under Entry 51, List II it is still a tax on luxuries within the meaning of Entry 62 of List II and a cess may be levied thereon. The argument is, in our judgment, misconceived. Education cess is not levied as an independent cess. It is levied as a cess on all items of land revenue, forest revenue and excise revenue. The

¹ (1958) S.C.J. 459 (1958) 1 An.W.R. (S.C.) 179 (1958) 1 M.L.J. (S.C.) 179 (1958) S.C.R. 1422.

² (1962) 3 S.C.R. (Supp.) 436 A.I.R. 1962 S.C. 1281.

³ (1967) 2 S.C.J. 287 (1967) 1 S.C.R. 548.

"shop-rent" collected under the terms of the auction not being land revenue, forest revenue or excise revenue, the question whether education cess could be levied by the State Legislature under Entry 62 of List II does not fall to be determined before us. Counsel also urged that under the terms of the auction the excise contractors had agreed to pay education cess. But the liability to pay cess is statutory; if the statute does not effectuate the levy, no liability may arise for payment of the cess merely from the conditions of the auction.

13. Counsel for the State informed us that since the judgment of the High Court the Schedule has been amended by the State Legislature, but he did not very properly ask us to determine the question whether under the amended Schedule the cess is leviable. We express no opinion on the question whether the State is competent to levy the cess after amendment of the Schedule to the Mysore Elementary Education Act, 1941. It will be open to the State to agitate the question if hereafter the education cess is sought to be levied under the authority of the amended Schedule.

14. The appeals therefore fail and are dismissed with costs. There will be one hearing fee.

V.K. *Appeals dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT.—*J. C. Shah, G. K. Mitter, K. S. Hegde, A. N. Grover and A. N. Ray, JJ.*

State of Mysore *Appellant**

v.

H. Papanna Gowda and another etc. *Respondents.*

Mysore University of Agricultural Sciences Act (XXII of 1963), section 7 (5)—Validity—Provision is ultra vires the State Legislature. I.L.R. (1960) Punj. 781, Distinguished. [Paras 7 and 8.]

Appeals from the Judgment and Order, dated the 9th/10th July, 1968 of the Mysore

High Court in Writ Petitions Nos 1776 2108, 2109, 2111, 2112, 2272, 2273, 2275, 2385, 2386, 2390, 2395 and 2396 of 1966, and 728 and 990 of 1967.

Jagdish Swarup, Solicitor-General of India (*S. S. Javali* and *S. P. Nayar*, Advocates, with him), for Appellant (In all the Appeals)

M Rama Jois and *R B Datar*, Advocates, for Respondent No 1 (In C.A.s. Nos 1868 to 1871 and 1874 to 1881 of 1969).

The Judgment of the Court was delivered by

Mitter, J.—The State of Mysore has come up in appeal from a common judgment of the High Court at Bangalore disposing of a number of writ petitions and holding void the compulsory transfer of the respondents herein to the Agricultural University under the provisions of the University of Agricultural Sciences Act, 1963.

2. As the same question arises in all these appeals it will be sufficient to state the facts in Civil Appeal No 1868 of 1969, in which one H. Papanna Gowda is the respondent. The said respondent was appointed on 7th January, 1959, as an agricultural demonstrator in the Mysore Civil Service. His appointment was as a 'local candidate' which under the Mysore Civil Service Rules means a person appointed not in accordance with the rules of recruitment. His services were however regularised when he was selected by the Public Service Commission for appointment to that post on 27th August, 1959. By an order, dated 4th April, 1964, he was transferred and posted as a Chemical Assistant of the Sugarcane Research Station, Mandya, in the Department of Agriculture. When he was thus employed, a law made by the State Legislature called the University of Agricultural Sciences Act, 1963 (hereinafter referred to as the 'Act') came into force on 24th April, 1964. Before the High Court the respondents to these appeals challenged the *vires* of section 7 (5) of the Act and a notification issued thereunder.

3. The preamble to the Act shows that it was an Act to establish and incorporate

*C.A. Nos. 1868 to 1882 of 1969.
24th November, 1970.

a University for the development of agriculture, animal husbandry and allied sciences in the State of Mysore Under section 3 (2) the University was to be a body corporate having perpetual succession and a common seal The powers given under section 6 of the Act enabled it *inter alia* to create administrative, ministerial and other posts and to appoint persons to such posts Under section 7 (1) subject to the conditions therein mentioned several agricultural and veterinary colleges were disaffiliated from the Karnataka University or the University of Mysore and were to be maintained by the new University as constituent colleges The control and management of these colleges were to stand transferred to the Agricultural University and all its properties and assets and liabilities and obligations of the State Government in relation thereto were to stand transferred to vest in or devolve upon the said University Under sub-section (4) of section 7 the control and management of such research and educational institutions of the Department of Agriculture the Department of Animal Husbandry and the Department of Fisheries of the State Government were as and from such date as the State Government might by order specify to be transferred to the University and thereupon all the properties and assets and liabilities and obligations of the State Government in relation to such institutions were to stand transferred to vest in or devolve upon the University Omitting the proviso which is not relevant for our purpose sub-section (5) provided

* Every person employed in any of the colleges specified in sub-section (1) or in any of the institutions referred to in sub-section (4) immediately before the appointed day or the date specified in the order under sub section (4) as the case may be, shall as from the appointed day or the specified date become an employee of the University on such terms and conditions as may be determined by the State Government in consultation with the Board

4 The Board has been defined in section 2 clause (3) as the Board of Regents of the University

5 By notification dated 29th September, 1965, the control and management of a

large number of research and educational institutions were transferred to the University with effect from 1st October 1965 The Agricultural Research Institute Mandya where the respondent was working was one such institution Not liking the change which his future prospects were likely to undergo as a result of the notification the respondent presented a writ petition seeking a declaration that sub-sections (4) and (5) of section 7 of the Act were invalid and for a further declaration that he continued to be a civil servant under the State Government To put in brief the argument on this head was that he had been removed from a civil post under the State in contravention of the provisions of Article 311

6 A further argument was put up that the respondent had been subjected to hostile discrimination inasmuch as persons who had been appointed in the same manner as himself and later in point of time than himself had been retained in the service of the State thereby infringing articles 14 and 16 of the Constitution

7 It is not necessary to deal with the second point as the appellant, in our opinion, must fail on the first There can be no dispute—as indeed the learned Solicitor General was constrained to admit—that the respondent and others who had filed writ petitions in the High Court challenging the notification ceased to hold the civil posts which they held under the State of Mysore at the time when the notification was issued if it was to have full force and effect Whether the prospects of the respondent were or were not to be prejudicially affected if he was to become an employee of the University is not in point However the learned Solicitor-General drew our attention to paragraph 17 of the counter affidavit to the writ petition filed in the High Court where it was stated that the terms and conditions of transfer as agreed to by the Government and the University provided *inter alia* for the following —

(1) Every employee of the Government on his transfer to the University shall enjoy the same pay scale,

(2) He was to be eligible for pensionary benefits in the same manner as he had while he was serving the Government,

(3) His claims for higher pay scales or higher positions under the University shall be deemed to be on a preferential basis in comparison with others, provided the qualifications and experience were equal; and

(4) Every employee of the Government on his transfer to the University was to be protected to the extent that the terms and conditions of his service under the University would not be altered to his detriment.

8. We are not here concerned with the question as to whether for all practical purposes the respondent was not to be a loser as a result of the transfer. Evidently the respondent held the view that as a civil servant of the State of Mysore the prospects of promotion to higher posts with better scales of pay were greater in the service of the State with its manifold activities in various departments. For better or for worse, the notification resulted in extinction of his status as a civil servant.

9. The learned Solicitor-General sought to rely on a judgment of the Punjab High Court in *Amulya Kumar Talukdar v. Union of India and others*¹ a case which was considered by the High Court of Mysore, in aid of his contention that the transfer of the kind effected in this case had been held to be valid by the Punjab High Court. The High Court at Bangalore went into the question rather elaborately and noted that there were many differences between the provisions of the Indian Institute of Technology (Kharagpur) Act, 1956, the Act impugned in the Punjab High Court and the Agricultural University Act of 1963. In the Punjab case the petitioner had initially been appointed by the Director, Indian Institute of Technology, Kharagpur as a peon. As a result of the Act of 1956 the Institution declared to be one of national importance, was constituted under the Act providing *inter alia* that the employees who were working in the Institute before were to hold office or service thereafter upon the same terms and conditions and with the same rights and privileges as to pension, leave, gratuity, provident fund and other matters as they would have held the same on the date of

commencement of the Act as if the Act had not been passed. In the case before us the Act provides by sub-section (5) of section 7 that the terms and conditions of the Government employees immediately before the appointed day or the date specified in the notification were to be such as might be determined by the State Government in consultation with the Board. The learned Judge of the Punjab High Court on the facts of that case found it unnecessary to examine the argument whether the assent given by the President to the Indian Institute of Technology Bill had the effect of terminating the status of the petitioners as Government servants by the President as also the argument raised on their behalf that their lien had been terminated under the Fundamental Rules without their consent. The Punjab decision cannot therefore apply to the case as presented before us.

10. In the result the appeals fail and are dismissed with costs. There will be one set of hearing fee.

V.K.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—S. M. Sikri and P. Jaganmohan Reddy, JJ.

Sheo Nath .. Appellant*

v. State of Uttar Pradesh ... Respondent.

Penal Code (XLV of 1860), sections 396, 411 and 412—Evidence Act (I of 1872), section 114, Illustration (a)—Recovery of part of stolen goods from accused three days after the occurrence of a dacoity—Presumption as to nature of offence committed.

In the present case three presumptions are possible from the recovery of the stolen goods from the appellant three days after the occurrence of the dacoity: (1) that the appellant took part in the dacoity; (2) that he received stolen goods knowing that the goods were stolen in the commission of a dacoity; and (3) that

1. I.L.R. (1960) Punj. 781; A.I.R. 1960 Punj. 284.

* Cr. A. No. 49 of 1969.

15th October, 1969.

the appellant received these goods knowing them to have been stolen. The choice to be made, however, must depend on the facts proved in this case. It is quite clear that all the property which was stolen by the dacoits was not recovered from the appellant. The only articles that were found were a length of muslin and a length of *Charkhana doriya*. The appellant is stated to be a cloth merchant and he may well have acquired these goods as a receiver. It has not been shown that in the village in which the appellant lived it was known that a dacoity had taken place and goods had been stolen in the dacoity. On the facts of this case the only legitimate presumption to be drawn is that the appellant knew that the goods were stolen but he did not know that they were stolen in a dacoity. The appellant, therefore, can only be convicted under section 411 and not under section 396 or 412 of the Indian Penal Code. [Paras 5 and 6]

Bhurgiri v The State, 1 L R (1964) 4 Raj 476, Rel on

Appeal by Special Leave from the Judgment and Order dated the 2nd December, 1968, of the Allahabad High Court in Criminal Appeal No 1277 of 1968

R L Kohli, for Appellant

O P Rana, for Respondent

The Judgment of the Court was delivered by

Sikri, J—The only question which arises in this appeal by Special Leave is whether the appellant, Sheo Nath, should be convicted under section 396, Indian Penal Code or section 411, Indian Penal Code or section 412 Indian Penal Code. The facts as found by the High Court are these. A dacoity was committed at the shop of Ram Murat in Dhaneja village by 15 to 20 persons on 19th August, 1966 at about 11-30 P.M. One dacoit Ram Shankar was armed with a gun while others carried spears, Gandas and lathis. During the course of the dacoity Ram Murat was injured. One Pancham who lived in a house not far from Ram Murat's shop and two others came running on hearing the noise. Pancham was shot down with the gun by dacoit Ram Shankar. The dacoits then escaped with clothes, ornaments, cash, etc., looted

from Ram Murat's shop. After the dacoits left Ram Murat dictated a report about the occurrence in which he named Ram Shankar Singh, Jaintri Prasad Singh, Nanhe Singh and Sulai accused as having been among the culprits and this report was sent to the Jalalpur police station, five miles away, where it was received and recorded at 6 A.M. next morning.

2 On 22nd August, 1966 i.e., three days after the dacoity the house of Sheo Nath appellant was searched and three lengths of cloth were recovered which were subsequently identified by Ram Murat and a tailor named Bismillah as having been stolen from Ram Murat's shop in the dacoity.

3 The High Court, agreeing with the learned Sessions Judge, relied on the evidence of three eye witnesses regarding the manner in which the occurrence took place and regarding the participation of the four named accused persons. Sheo Nath had not been named by the eye witnesses or in the dying declaration of Pancham and no witness claimed to have identified him taking part in the dacoity. But, relying on the discovery of three lengths of cloth and their identification, the High Court convicted Sheo Nath under section 396, Indian Penal Code. The High Court observed

"From the material on record we are fully convinced that the Exhibits 2 and 3 were stolen from the shop of Ram Murat in the course of the dacoity committed in the night between 19th to 20th August, 1966, and since they were recovered from the possession of Sheo Nath appellant only 2 or 3 days later, it is legitimate to infer that he was one of the dacoits *vide* illustration (a) to section 114 of the Evidence Act. Sheo Nath therefore, has been rightly convicted under section 396, Indian Penal Code."

4 The learned Counsel for the appellant contends that in the circumstances of the case the High Court should not have convicted the appellant under section 396, Indian Penal Code, but only under section 411 Indian Penal Code. Section 114 of the Evidence Act and illustration (a) read as follows

"114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case.

Illustrations.

The Court may presume—

(a) that a man who is in possession of stolen goods after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession."

This section was considered by this Court in *Sanwat Khan v. State of Rajasthan*¹, This Court, after considering some High Court cases, observed:

"In our judgment no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take the place of proof."

In *Wasim Khan v. State of Uttar Pradesh*², this Court held that "recent and unexplained possession of the stolen property while it would be presumptive evidence against a prisoner on the charge of robbery would similarly be evidence against him on the charge of murder." On the facts of that case this Court held that the appellant was rightly convicted of the offence of murder and robbery. But, apart from the possession of stolen property, there were other circumstances indicating that the appellant was guilty of murder and robbery. The circumstances were that the appellant in that case had travelled with the deceased on his bullock cart alone and the deceased never reached his home and was found murdered. The appellant was found in possession of the

goods of the deceased three days after and the appellant made no effort to trace the whereabouts of the deceased or lodge information of his disappearance from the bullock cart.

5. In the present case three presumptions are possible from the recovery of the stolen goods from the appellant three days after the occurrence of the dacoity,

(1) that the appellant took part in the dacoity;

(2) that he received stolen goods knowing that the goods were stolen in the commission of a dacoity, and

(3) that the appellant received these goods knowing them to have been stolen.

The choice to be made, however, must depend on the facts proved in this case. It is quite clear that all the property which was stolen by the dacoits was not recovered from the appellant. We may repeat that clothes, ornaments, cash, etc. were stolen. The only articles that were found with the appellant were a length of *muslin* (Exhibit 2) and a length of *Charkhana doriya* (Exhibit 3). The appellant is stated to be a cloth merchant and he may well have acquired these goods as a receiver. It has not been shown that in the village in which the appellant lived it was known that a dacoity had taken place and goods had been stolen in the dacoity

6. On the facts of this case it seems to us that the only legitimate presumption to be drawn is that the appellant knew that the goods were stolen but he did not know that they were stolen in a dacoity. The appellant, therefore, can only be convicted under section 411, Indian Penal Code.

7. In this connection we may refer to a decision of the Rajasthan High Court in *Bhurgiri v. The State*¹, (Wanchoo, C.J. and Dave, J.) Wanchoo, C.J. after holding that the recovery of ornaments from Bhurgiri had been established, observed:

"The next question is whether on this evidence Bhurgiri can be convicted for dacoity. The recovery took place

1. A.I.R. 1956 S.C. 54

2 (1956) S.C.R. 191 : (1956) S.C.J. 437 : (1956) 2 M.L.J. (S.C.) 9 : (1956) An. W.R. 203.

1. I.L.R. (1954) 4 Raj. 476, 482-484.

five days after the dacoity. It is not impossible that during that period the property might have passed from the dacoits to a receiver. Under these circumstances, we are of opinion that it would not be safe to convict Bhurgiri of dacoity on the evidence of this recovery alone. It would be more proper to convict him as a guilty receiver.

Then the question arises whether he should be convicted under section 411 or 412 Indian Penal Code. So far as section 411 is concerned, he is clearly guilty under the section. The presumption under section 114 applies, and we can safely presume that he is a guilty receiver of stolen property particularly when we find that the property was kept in the *Bara*, and not at his own house. He must have had reason to believe that it was stolen when he received the property, and that is why he left it in the *Bara*. But we feel that it would not be proper to convict him under section 412 because that section requires that the receiver should know or have reason to believe that the property had been transferred by the commission of dacoity. The prosecution, in our opinion, has to show something more than the mere possession of stolen goods for a conviction under section 412. If the prosecution is only able to show mere possession, the proper section to use is 411."

B In the result the appeal is allowed and the appellant convicted under section 411, Indian Penal Code, instead of section 396, Indian Penal Code, and sentenced to undergo rigorous imprisonment for three years.

V K

*Appeal allowed,
Conviction altered to
me under section 411*

THE SUPREME COURT OF INDIA (Civil Appellate Jurisdiction)

PRESENT — J C Shah and K S Hegde, JJ

M/s Travancore Rayons Ltd

.. Appellant*

v

The Union of India and
others

Respondents

M/s Special Steel Ltd and another
Intervenors

Central Excise and Salt Act (I of 1944), section 36—Order of the Central Government (Arsonal authority)—Appeal to Supreme Court lies—Order should be a speaking order supported by reasons

The orders made by the Central Government in the exercise of the judicial power of the State under section 36 are subject to appeal to Supreme Court under Article 136 of the Constitution. It would be impossible for the Supreme Court in such appeal to decide the dispute without a speaking order of the authority setting out the nature of the dispute, the arguments in support thereof raised by the aggrieved party and reasonably disclosing that the matter received due consideration by the authority competent to decide the dispute. Exercise of the right to appeal to Supreme Court would be futile if the authority chooses not to disclose the reasons in support of the decision reached by it. A party who approaches the Government in exercise of a statutory right, for adjudication of a dispute is entitled to know at least the official designation of the person who has considered the matter, what was considered by him and the reasons for recording a decision against him.

[Para 7]

Madhya Pradesh Industries Ltd v Union of India and others, (1966) 1 S C J 204. Held overruled by *Bhagat Raja v Union of India*, (1968) 1 S C J 431.

[Para. 9]

Necessity to give sufficient reasons which disclose proper appreciation of the problem to be solved and be mental process by which the conclusion is reached in cases where a non-judicial authority

exercises judicial functions, is obvious. When judicial power is exercised by an authority normally performing executive or administrative functions, the Supreme Court would require to be satisfied that the decision has been reached after due consideration of the merits of the dispute, uninfluenced by extraneous considerations of policy or expediency. The Court insists upon disclosure of reasons in support of the order on two grounds: one, that the party aggrieved in a proceeding before the High Court or the Supreme Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous: the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power. [Para. 11.]

Appeal by Special Leave from the Order No. 543 of 1966 dated the 16th July, 1966 of the Government of India, Ministry of Finance, New Delhi in Central Excise Revision Application.

S. Mohan Kumaramangalam, Senior Advocate, (*Soli J. Sorabji, A. K. Varma*, Advocates, and *Ravinder Narain, J. B. Dadachanji* and *O. C. Mathur*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant.

Dr. V. A. Seyid Muhammad, Senior Advocate (*S. P. Nayar*, Advocate, with him), for Respondents.

B. R. Agarwala, Advocate of *M/s. Gagrai & Co.*, for Intervener No. 1.

Soli J. Sorabji, Advocate, and *Ravinder Narain* and *J. B. Dadachanji*, Advocates of *M/s. J. B. Dadachanji & Co.* for Intervener No. 2.

The Judgment of the Court was delivered by

Shah, J.—The appellant-company is engaged in the production of cellulose film. The Central Excise Inspector reported that the appellant-company was producing in its factory, nitro-cellulose lacquer [falling under tariff Item No. 22 (iii) (i) No. 14 (iii) (i) of the First Schedule to the Central Excise and Salt Act, 1944, read with the Finance Act, 1955], without obtaining a central excise licence as required by the rules

and was also removing nitro-cellulose lacquer for "internal use" without payment of duty. The appellant-company denied that the chemical compound utilised by it to render plain film moisture-proof was "nitro-cellulose lacquer" within the meaning of the Central Excise and Salt Act, 1944.

2. The Deputy Superintendent of Central Excise, determined that the appellant-company was liable to pay, for the period between 1st March, 1955 and 19th September, 1962. Rs. 4,88,797.34 as excise duty on the consumption of nitro-cellulose lacquer produced by the Company. The Deputy Superintendent issued a demand notice, but the appellant-company failed to pay the duty.

3. The Assistant Collector of Customs required the appellant-company to show cause why penalty should not be imposed on it for failing to obtain a licence for production of nitro-cellulose lacquer. The appellant-company contended that what was produced by it was not nitro-cellulose lacquer. The Assistant Collector rejected the contention and confirmed the order of assessment and imposed a penalty of Rs. 25

4. In appeal to the Collector, the appellant-company raised a large number of contentions—including the following :

(1) that nitro-cellulose lacquer which is clear as well as pigmented falls within the purview of Item 14 of the First Schedule to the Central Excise and Salt Act, 1944, and that clear and white, or murky and pigmented lacquer is not subject to duty;

(2) that a certificate of test issued by the Silk Mills Research Association, Bombay, showed that the nitro-cellulose lacquer content of a sample of surface-coating compound produced by the appellant-company was only 4.7 per cent. and it could not be considered nitro-cellulose lacquer within the meaning of the Act; and

(3) that the failure to levy duty on the product from 1955 to 1962 was proof of the fact that the Excise Department was itself of the view that the product was not excisable.

5 The Collector of Customs consulted the Chemical Examiner and was of the view that the opinion expressed by the Silk Mills Research Association Bombay, was not correct. In considering the question about the reason for not levying duty for nearly seven years, the Collector thought it necessary to give a fresh hearing to the appellant-company. Additional arguments were advanced at the second hearing. After considering the arguments advanced by the appellant-company the Collector wrote a detailed judgment setting out the "points" on which he held against the claim of the appellant company and expressed the view that the appellant company was not right in contending that only that chemical which is 'clear and pigmented' falls within the purview of Item 14 of the First Schedule.

6 Against the order dismissing the appeal, the appellant-company moved a petition invoking the revisional jurisdiction of the Central Government under section 36 of the Central Excise and Salt Act, 1944. The petition was entertained, but no personal hearing was given to the appellant-company. By order dated 16th July, 1966, communicated by the Joint Secretary to the Government of India, Ministry of Finance, the petition was rejected. The order read

"The Government of India have carefully considered the points made by the applicant(s) but see no justification for interfering with the order in appeal. The revision application is accordingly rejected."

Against the order passed by the Central Government this appeal is preferred with Special Leave.

7 The question raised before the Collector of Customs was of a complicated nature and for its proper appreciation required familiarity with the chemical composition and physical properties of nitro-cellulose lacquers and of the substance produced by the appellant-company. The Collector in deciding the appeal wrote an order running into 18 typed pages. There were before the Collector conflicting opinions of the Chemical Examiner and the Silk Mills Research Association Bombay. The Collector gave two personal hearings to

the appellant company. No personal hearing was given by the Government of India to the appellant company even though the matter raised complex questions. It is true that the rules do not require that personal hearing shall be given but if in appropriate cases where complex and difficult questions requiring familiarity with technical problems are raised, personal hearing is given, it would conduce to better administration and more satisfactory disposal of the grievances of citizens. The order does not disclose the name or designation of the authority of the Government of India who considered "the points made by the applicant," and it is impossible to say whether the officer was familiar with the subject matter so that he could decide the dispute without elucidation and merely on an perusal of the papers. The form in which the order was communicated is apparently a printed form. There is a bare assertion by the Joint Secretary to the Government of India in his communication that the Government of India had 'carefully considered the points made by the applicants' there is no evidence as to who considered the "points" and what was considered. The Central Government is by section 36 invested with the judicial power of the State. Orders involving important disputes are brought before the Government. The orders made by the Central Government are subject to appeal to this Court under Article 136 of the Constitution. It would be impossible for this Court, exercising jurisdiction under Article 136, to decide the dispute without a speaking order of the authority, setting out the nature of the dispute, the arguments in support thereof raised by the aggrieved party and reasonably disclosing that the matter received due consideration by the authority competent to decide that dispute. Exercise of the right to appeal to this Court would be futile, if the authority chooses not to disclose the reasons in support of the decision reached by it. A party who approaches the Government in exercise of a statutory right, for adjudication of a dispute is entitled to know at least the official designation of the person who has considered the matter, what was considered by him and the reasons for recording a decision against him. To enable the High Court or this Court to exercise its constitutional powers, not only the

decision, but an adequate disclosure of materials justifying an inference that there has been a judicial consideration of the dispute by an authority competent in that behalf in the light of the claim made by the aggrieved party, is necessary. If the Officer acting on behalf of the Government chooses to give no reasons, the right of appeal will be devoid of any substance.

8. Dr. Seyid Muhammad appearing for the Union of India contended that where the Central Government dismisses the petition, it is not obliged to give any reasons, for, it must be assumed that the Government had accepted every reason given by the Collector, and by dismissing the petition the officer acting on behalf of the Government must be deemed to have incorporated the reasons given by the Collector in the judgment. Counsel relies in support of this contention on the decision of this Court in *Madhya Pradesh Industries Ltd. v. Union of India and others*¹. In that case, Bachawat, J., on behalf of himself and Mudholkar, J., refused to accept the contention that the order passed by the Government of India rejecting a revision application under the Mineral Concession Rules was liable to be quashed, because it did not give any reasons. Bachawat, J., observed at page 477:

"There is a vital difference between the order of reversal by the appellate authority in that case for no reason whatsoever and the order of affirmance by the revising authority in the present case. Having stated that there was no valid ground for interference, the revising authority was not bound to give fuller reasons. It is impossible to say that the impugned order was arbitrary, or that there was no proper trial of the revision application."

On the other hand, Subba Rao, J., observed at page 472 :

"The least a tribunal can do is to disclose its mind. The compulsion of disclosure guarantees consideration. The condition to give reasons introduces clarity and excludes or at any rate minimizes arbitrariness; it gives satisfaction to the party against whom the order is made; and it also enables an

appellate or supervisory Court to keep the tribunals within bounds. A reasoned order is a desirable condition of judicial disposal.

The conception of exercise of revisional jurisdiction and the manner of disposal provided in rule 55 of the rules are indicative of the scope and nature of the Government's jurisdiction. If tribunals can make orders without giving reasons, the said power in the hands of unscrupulous or dishonest officers may turn out to be a weapon for abuse of power. But if reasons for an order are given, it will be an effective restraint on such abuse, as the order, if it discloses extraneous or irrelevant considerations, will be subject to judicial scrutiny and correction. A speaking order will at its best be a reasonable and at its worst be at least a plausible one. The public should not be deprived of this only safeguard.

* * * The habit of mind of an executive officer so formed cannot be expected to change from function to function or from act to act. So it is essential that some restrictions shall be imposed on tribunals in the matter of passing orders affecting the rights of parties; and the least they should do is to give reasons for their orders. * * * Ordinarily, the appellate or revisional tribunal shall give its own reasons succinctly; but in a case of affirmance where the original tribunal gives adequate reasons, the appellate tribunal may dismiss the appeal or the revision, as the case may be, agreeing with those reasons. What is essential is that reasons shall be given by an appellate or revisional tribunal expressly or by reference to those given by the original tribunal. The nature and the elaboration of the reasons necessarily depend upon the facts of each case."

9. In a later judgment *Bhagat Raja v. The Union of India and others*¹, the Constitution Bench of this Court in effect overruled the judgment of the majority in *Madhya Pradesh Industries Ltd.'s case*². The Court held that the decisions of

1. (1968) 1 S.C.J. 431; (1968) 1 M.L.J. (S.C.) 77; (1968) 1 An.W.R. (S.C.) 77; (1967) 3 S.C.R. 302.

2. (1966) 1 S.C.J. 204; (1966) 1 S.C.R. 466. (1966) S.C.D. 342.

1. (1966) 1 S.C.J. 204; (1966) S.C.D. 342; (1966) 1 S.C.R. 466.

tribunals in India are subject to the supervisory powers of the High Court under Article 227 of the Constitution and of appellate powers of this Court under Article 136. The High Court and this Court would be placed under a great disadvantage if no reasons are given and the revision is dismissed by the use of the single word rejected' or dismissed. The Court in that case held that the order of the Central Government in appeal, did not set out any reasons of its own and on that account set aside that order. In our view, the majority judgment of this Court in *Madhya Pradesh Industries Ltd s case*¹ has been overruled by this Court in *Bhagad Raja s case*².

10 In later decisions of this Court it was held that where the Central Government exercising power in revision gives no reasons the order will be regarded as void see *State of Madhya Pradesh and another v Seth Narsinghdas Jankidas Mehta*³, *The State of Gujarat v Patel Raghav Natha and others*⁴ and *Prag Das Umar Vaishya v The Union of India and others*⁵.

11 In this case the communication from the Central Government gave no reasons in support of the order the appellant-company is merely intimated thereby that the Government of India did not see any reasons to interfere with the order in appeal'. The communication does not disclose the 'points which were considered, and the reasons for rejecting them. This is a totally unsatisfactory method of disposal of a case in exercise of the judicial power vested in the Central Government. Necessity to give sufficient reasons which disclose proper appreciation of the problem to be solved, and the mental process by which the conclusion is reached, in cases where a non-judicial authority exercises judicial functions, is obvious. When judicial power is exercised by an authority normally performing executive or administrative

functions, this Court would require to be satisfied that the decision has been reached after due consideration of the merits of the dispute, uninfluenced by extraneous considerations of policy or expediency. The Court insists upon disclosure of reasons in support of the order on two grounds, one, that the party aggrieved in a proceeding before the High Court or this Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous, the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power.

12 The appeal is allowed and the order passed by the Central Government is set aside. The case is remanded to the Central Government with the direction that it be disposed of according to law. In this case, we are of the view, having regard to the complicated and technical questions involved, that the Central Government may be well advised to give an oral hearing to the appellant company. The Union of India will pay the costs of this appeal to the appellant company.

V K

— Appeal allowed, case remanded

¹ (1966) 1 S.C.R. 466 (1966) 1 S.C.J. 204 (1966) S.C.D. 342

² (1968) 1 S.C.J. 431 (1968) 1 M.L.J. (S.C.) 77 (1968) 1 An. W.R. (S.C.) 77 (1967) 3 S.C.R. 302

³ C.A. No 621 of 1966 decided on 29th April, 1969

⁴ (1970) 1 S.C.J. 251 (1970) 1 S.C.R. 335 A.L.R. 1969 S.C. 1297

⁵ (1957) Jab L.J. 817

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THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—*J.M. Shelat and C.A. Vaidialingam, JJ.***Shankar Madhoji Nemade** *Appellant**
v.**Ghisuji Janaji Bhadke and others** *Respondents.*(A) *Constitution of India (1950), Article 136—Special Leave petition—Untrue or false statements made—Effect—Special Leave granted if liable to be revoked.*

The statements in the Special Leave application should not contain any untrue or false statements either in material particulars or on matters of importance either on facts or about valuation and the requirement in this regard cannot be over-emphasised. If there is any untrue averment regarding material statements or a false statement on matters of importance or a deliberate untrue statement regarding valuation has been made to mislead the Court, it cannot be gainsaid that the Special Leave granted will have to be revoked. Case-law discussed.

[*Paras. 8, 11.*]

In the instant case, however, in the particular circumstances it cannot be said that the appellant is guilty of making any false or untrue statement on any material particulars or matters of importance regarding valuation so as to justify revocation of the leave already granted. The mistake committed by the appellant regarding valuation was the result of the mistaken value given by the High Court itself in its judgment, which was corrected only long afterwards. No doubt, the appellant who is a party to proceedings should have been a little more careful but that does not disclose any deliberate attempt on his part to mislead the Court. Further the statement regarding valuation is not of much consequence because the questions arising for decision in the instant case are really points of law. [*Para. 13.*]

(B) *Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (XCIX of 1958), section 52—Scope and applicability.*

The normal and reasonable construction to be placed upon section 52 of the Bombay Act XCIX of 1958 is that it will apply only to cases of lands, the possession of which was obtained by the landlord under section 9 of the Berar Regulation of Agricultural Leases Act (XXIV of 1951), but in respect of which the period of two years disability imposed under section 9 (6) of that Act read with rule 9 of the rules framed thereunder was not over before the coming into force of the Bombay Act. In respect of such landlord, section 52 enlarges the period for which he is required to personally cultivate the lands. [*Para. 35.*]

Ramchandra v. Tukaram and others, (1966) 1 S.C.R. 594 : (1966) 1 S.C.J. 357, Dist. *Saraswatibai Babji Tukaram Umkar v. Bhikamchand Premsukhdas*, (1966) 68 Bom. L.R. 954, Overruled in part.

Thus, section 52 applies to all cases where possession is taken by the landlord on or after 30th December, 1958, on the basis of an order obtained under the Berar Act. It applies to cases where possession had been taken by a landlord under the Berar Act but the two years period of personal cultivation had not been completed when the Bombay Act came into force. (Instances of land-lord taking possession under the provisions of the Bombay Act not considered in the instant appeal).

[*Para. 36.*]

Section 52 extends the period of personal cultivation to 12 years in all cases to which it applies. [*Para. 33.*]

(C) *Civil Procedure Code (V of 1908), section 35—Appellant careless in giving valuation of subject-matter of appeal in Special Leave petition under Article 136 of Constitution—Costs refused though appeal was allowed.* [*Para. 39.*]

Appeal by Special Leave from the Judgment and Decree, dated the 19th August, 1966 of the Bombay High Court, Nagpur Bench in Special Civil Application No. 831 of 1965.

Dr. W.S. Barlingay, Senior Advocate, (*A.G. Ratnaparkhi*, Advocate, with him), for Appellant.

M.S. Gupta and S.K. Dhingra, Advocates, for Respondent No. 1.

The Judgment of the Court was delivered by

Vaidialingam, J—The appellant was a "protected lessee within the meaning of that expression contained in the Berar Regulation of Agricultural Leases Act (XXIV of 1951) (hereinafter called the Berar Act) in respect of the suit lands bearing survey No 23 of an extent of 7 acres and 4 gunthas under the 5th respondent herein, who was then the original owner of the lands. The 5th respondent served on the appellant (hereinafter called the tenant) a notice dated 28th December, 1955 under section 9 (1) of the Berar Act terminating the tenancy of the appellant on the ground that he required the lands for personal cultivation, and he also submitted an application to the Revenue Officer under section 8 (1) (g) of the Berar Act for an order determining the tenancy. The 5th respondent obtained an order from the Revenue Officer on 15th May 1956 directing the tenant to surrender possession of the lands. The 5th respondent in pursuance of the order of the Revenue Officer obtained possession of the lands on 4th April 1957, and continued in such possession till 21st June, 1961, on which date he transferred the suit lands to the first respondent (hereinafter to be referred as the landlord) and got in exchange 8 acres in survey No 33 plus an amount of Rs 13,000. In the meanwhile on 30th December 1958 the Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (XCIX of 1958) (hereinafter called the Bombay Act) came into force.

2 The tenant filed an application under section 52 of the Bombay Act before the Naib Tahsildar, Achalpur, against respondents Nos 1 and 5 for restoration of the possession of the suit lands on the ground that the original owner, the 5th respondent had ceased to cultivate the lands personally within the period of 12 years after obtaining possession of the lands on 4th April, 1957. The Naib Tahsildar by his order dated 14th November, 1962 dismissed the application on the ground that section 52 does not apply and hence the application was not maintainable. On appeal by the tenant, the Special Deputy Collector, Amravati by his order 30th June 1964, reversed the decision of the Naib Tahsildar and directed the landlord to restore possession of the lands as prayed for by the

tenant. The first respondent's revision challenging the order of the Special Deputy Collector was dismissed on 5th August, 1965 by the Maharashtra Revenue Tribunal. The Revenue Tribunal while dismissing the revision petition, *inter alia* held that the tenant was a protected lessee and that in pursuance of the proceedings taken by the 5th respondent in terms of the notice under section 9 (1) of the Berar Act, the tenant was deprived of the lands and his tenancy rights on the ground of personal cultivation by the then owner of the lands. The Tribunal further held that as the 5th respondent had transferred the suit lands in favour of the first respondent on 21st June, 1961, the former must be considered to have failed to use the lands for the purpose specified in his notice within 12 years from the date on which he took possession and in consequence the tenant was entitled to be restored to possession under section 52 of the Bombay Act. On this reasoning the Revenue Tribunal confirmed the order of restoration passed by the Special Deputy Collector in favour of the tenant.

3 The first respondent filed a writ petition under Article 227 of the Constitution, being Special Civil Application No 831 of 1965, in the High Court of Bombay (Nagpur Bench) challenging the orders for restoration passed against him by the Special Deputy Collector and the Maharashtra Revenue Tribunal. The High Court by its judgment and order, dated 19th August, 1966, has set aside the orders of the Special Deputy Collector and the Revenue Tribunal thus restoring the order of the Naib Tahsildar, and has dismissed the application for restoration filed by the tenant. The tenant challenges the decision of the High Court in this appeal by Special Leave.

4 The High Court in its order under appeal has recorded the following findings. The original owner, the 5th respondent, was entitled to terminate the lease of the tenant by giving a notice under section 9 (1) of the Berar Act. He accordingly terminated the tenancy by giving notice, dated 23rd December, 1955. After initiating proceedings under section 8 (1) (g) read with section 19 (1) of the Berar Act, the owner also obtained possession of the lands on 4th April, 1957. Under the

Berar Act there was a duty cast on the landlord to cultivate the lands personally for a period of 2 years and in this case the 5th respondent has complied with this requirement. As possession was taken from the tenant by the 5th respondent when the Berar Act was in operation and as the latter had cultivated the lands for a period of 2 years, as required by section 9 (6) of the Berar Act, the tenant has ceased to have any rights after the expiry of the period of 2 years and hence section 52 of the Bombay Act was not applicable and it follows that the application for restoration under that section filed by the tenant was not maintainable. The position is concluded against the tenant by an earlier Full Bench decision of the High Court reported in *Saraswatibai Babji Tukaram Umakar v. Bhikamchand Prem-sukhdas*¹, wherein it had been held that when possession of the lands had been taken before coming into force of the Bombay Act, the rights and liabilities of the parties are governed by the Berar Act and that section 52 of the Bombay Act has no retrospective operation. On these findings the High Court allowed the writ petition of the first respondent.

5. Dr. Barlingay, learned Counsel for the appellant, has urged that having due regard to the scheme of the Berar and Bombay Acts, the High Court's view that section 52 of the Bombay Act has no application, is erroneous. In this case, he pointed out that the Bombay Act has come into force on 30th December, 1958, even before the expiry of the period of two years from 4th April, 1957, on which date the original owner, the 5th respondent, had entered into possession, after terminating the lease. Section 52 of the Bombay Act contains provisions substantially similar to section 9 (6) of the Berar Act which was repealed and the only change was that the Bombay Act enlarged the period for which the landlord was required to continue to cultivate land personally from two years to 12 years. As the enlarged period under the Bombay Act has come into operation before the expiry of the shorter period under the Berar Act, which was repealed, the landlord was bound to conform to the requirements of the larger period provided under the Bombay Act. In this case the 5th respondent had transferred the suit lands

to the first respondent on 21st June, 1961, and hence there has been a failure in law on the part of the 5th respondent to utilise the lands for the purpose of personal cultivation for the period mentioned in section 52 of the Bombay Act and so the said section fully applies and the dismissal of the tenant's application for restoration by the High Court is opposed to the mandatory provisions of the Bombay Act. The Counsel, further pointed out that in the Full Bench decision, on which the present judgment of the High Court is rested, is not applicable for the reason that the Full Bench was dealing with a case where the period provided under section 9 (d) of the Berar Act had already expired before the coming into force of the Bombay Act, whereas in the case on hand even before the expiry of that two years' period the Bombay Act has come into force. This material difference has not been noted in the present order by the High Court. He further urged that if the Full Bench decision applies, as held by the High Court, it should be held by this Court that the Full Bench decision is not correct.

6. Mr. M S. Gupta, learned Counsel for the first respondent, landlord, raised a preliminary objection to the hearing of the appeal and prayed for cancellation of the Special Leave granted by this Court on 11th January, 1967. According to him the appellant has made deliberately certain false statements in his application for grant of Special Leave. We will revert to this aspect a little later. On merits Mr. Gupta contended that the obligation of his client's transferor, the 5th respondent after obtaining possession of the lands from the tenant under the Berar Act was only to cultivate the lands for two years. Admittedly in this case the 5th respondent had cultivated the lands for the said period of two years and the obligation incurred by him under section 9 (6) of the Berar Act having been duly complied with, section 132 (2) of the Bombay Act stands attracted. The Counsel pointed out that section 132 deals with repeals and savings. Sub-section (1) had repealed the enactments specified in Schedule I to the extent specified in column No. 4 of the said Schedule. Schedule I shows that the Berar Act has been repealed in its entirety. Notwithstanding the repeal sub-section (2) has

saved certain matters and one of the matters so saved is the obligation or liability already incurred before the commencement of the Bombay Act. The 5th respondent who had incurred the obligation or liability to cultivate the lands for two years under the Berar Act before the commencement of the Bombay Act has discharged the said obligation or liability and hence the tenant has no further rights which he can enforce. He also urged that section 52 protects even cases where possession has been taken after the coming into force of the Bombay Act on the basis of an order for restoration obtained under the Berar Act. In support of this contention he relied on the decision in *Ramchandra v. Tukaram and others*¹.

7 Before we deal with the merits we will now dispose of the preliminary objection raised by Mr. Gupta praying for cancellation of Special Leave granted by this Court. According to the learned Counsel the appellant has deliberately made certain false statements in the application for grant of Special Leave and has misguided the Court. He drew our attention to the statements made in paragraph 6 of the application wherein the appellant has stated that the 5th respondent had transferred the suit lands in favour of the first respondent on 21st June, 1961, by taking in exchange 8 acres of land plus a sum of Rs. 30,000. Again in paragraph 10 of the petition the appellant has stated that his claim in these proceedings is for restoration of possession of the lands measuring 7 acres and 4 gunthas the market value of which happens to be more than Rs. 20,000 and that this fact is further strengthened because of the 5th respondent exchanging his lands with the first respondent for a sum of Rs. 30,000 plus 8 acres of land. The appellant has filed an affidavit stating that the statements contained in the Special Leave petition are true and correct to the best of my personal knowledge. From these statements Mr. Gupta pointed out that it is clear that the appellant has categorically stated that the value of the lands concerned in this appeal is over Rs. 20,000 and he has also specifically stated that the suit lands were exchanged for Rs. 30,000 plus 8 acres of lands and these statements have been affirmed to

be true to the personal knowledge of the appellant.

8 Mr. Gupta pointed out that these statements regarding valuation are absolutely false to the knowledge of the appellant as will be clear from the value given in the writ petition filed by the first respondent in the High Court. In para 1 of the writ petition the first respondent has stated that the 5th respondent after transferring the suit lands of 7 acres and 4 gunthas has taken in exchange from him 8 acres of land and a sum of Rs. 13,000 thus making a total of Rs. 19,000. In the affidavit filed along with the writ petition the first respondent has again stated that the amount received from him along with 8 acres of land was Rs. 13,000 the total value of the lands being only Rs. 19,000. He also drew our attention to the recitals in the judgment printed in the appeal records wherein the exchange has been stated as being of 8 acres of land plus a sum of Rs. 13,000. In view of these circumstances, the Counsel points out that the statements made by the appellant, which have been affirmed to be true to his knowledge about valuation of the suit lands being over Rs. 20,000 and the exchange having been obtained of 8 acres and Rs. 30,000 are false and have been deliberately made to mislead the Court so as to obtain Special Leave making it appear that the requirement regarding valuation is satisfied. Mr. Gupta drew our attention to the decisions of this Court, namely, *Hari Narain v. Badri Das*¹, *Sita Bai v. Sonu Vani Wani and others*² and *S.R. Shetty v. Phirozeshah Ausrseruani, Golabawalla and another*³. Mr. Gupta pointed out that in all these decisions when there has been false statements made on material particulars or matters of importance either on facts or about valuation, this Court had cancelled Special Leave already granted. The proposition enunciated by Mr. Gupta that the statements in the Special Leave application should not contain any untrue or false statements either in material particulars or on matters of importance or about valuation is certainly laid down

¹ (1964) 1 S.C.J. 51 (1964) 1 M.L.J. (S.C.) 25 (1954) 1 A.W.R. (S.C.) 25 (1964) 2 S.C.R. 203

² C.A. No. 982 of 1965 decided on 5th April, 1968

³ C.A. No. 155 of 1963 decided on 5th April, 1963

in those decisions and the requirement in this regard cannot be overemphasised. In *Hari Narain v. Badri Das*¹, this Court held that the Special Leave petition contained inaccurate, untrue and misleading statements and cancelled Special Leave already granted. This Court observed at page 209 as follows :

“It is of utmost importance that in making material statements and setting forth grounds in applications for Special Leave, care must be taken not to make any statements which are inaccurate, untrue or misleading. In dealing with applications for Special Leave, the Court naturally takes statements of facts and grounds of fact contained in the petitions at their face value and it would be unfair to betray the confidence of the Court by making statements which are untrue and misleading.”

9. From the facts in that case it will be seen that the material statements made in the Special Leave petition were false.

10. In *Sita Bai v. Sonu Vangi Wani and others*², this Court held that in the Special Leave petition there was a misrepresentation of facts on a matter of importance, though it was not possible to say that when granting Special Leave these untrue facts had misled the Court. It has been further emphasised in this decision that the appellant had deliberately made untrue statements on matters of importance and that they were not the result of inadvertence. Similarly in *S.R. Shetty v. Phirozeshah Nusserwanji Golabawalla and another*³, a statement had been made regarding the value of the subject-matter as being above Rs. 20,000 though the suit had been valued only in the sum of Rs. 500 and court-fee paid on that valuation. This Court held that the statements of valuation in the plaint, namely, Rs. 500 cannot be reconciled with the statement regarding valuation in the Special Leave application and this Court took the view that the valuation has been deliberately inflated with a view to getting over the prelimi-

nary hurdle as regards valuation. In this view the Special Leave granted was revoked.

11. If it is held that there has been an untrue averment regarding material statements or a false statement on matters of importance or a deliberate untrue statement regarding valuation has been made to mislead this Court, it cannot be gainsaid that the Special Leave granted by this Court will have to be revoked.

12. Dr. Barlingay pointed out that there has been no untrue or false statement made by his client on any material particular nor has any statement been deliberately made to mislead the Court so as to enable his client to obtain Special Leave. On the other hand, the Counsel pointed out, that the certified copy of the judgment of the High Court furnished to his client and which has been filed in this Court clearly shows that in the said copy the High Court has stated that the 5th respondent obtained an exchange from the first respondent 8 acres of land plus a sum of Rs. 30,000. That mistaken value given in the High Court judgment has been adopted in the Special Leave petition. The points that have been raised in the Special Leave petition are all questions of law relating to legal effect of possession under the Berar Act after coming into force of the Bombay Act. The valuation given in the certified copy of the High Court judgment was incorporated in the Special Leave petition filed as early as 11th January, 1967. He further pointed out that on 28th March, 1967, his client had moved the High Court for correcting the High Court's judgment by deleting the valuation of Rs. 30,000 and substitute the same by correct figure of Rs. 13,000. The Counsel for both the parties agreed before the High Court that the figure of Rs. 30,000 contained in the judgment was an error and that the correct figure should be Rs. 13,000. The High Court accordingly by its order, dated 17th April, 1967, corrected the judgment by stating that the valuation of Rs. 30,000 should be corrected to Rs. 13,000. That order was passed nearly three months after the Special Leave application was filed in this Court. In view of the fact that his client and the Counsel acting for him at the time of drafting the petition for Special Leave

1. (1964) 1 S.C.J. 51 : (1964) 1 M.L.J. (S.C.) 25; (1964) 1 An.W.R. (S.C.) 25; (1964) 2 S.C.R. 203.

2. C.A. No. 982 of 1965, decided on 25th April, 1968.

3. C.A. No. 155 of 1963 decided on 5th April 1963.

adopted the valuation given in the certified copy of the High Court's judgment, D Balingay pointed out that there has been no untrue or false statement given by his client so as to justify revocation of the leave already granted.

13 We have given due consideration to all these aspects presented before us by both the learned Counsel and we are of the view that in the particular circumstances of this case it cannot be said that the appellant is guilty of making any false or untrue statement on any material particulars on matters of importance or regarding valuation. The mistake committed by the appellant regarding valuation was the result of the mistaken value given by the High Court itself in its judgment which was corrected only long afterwards. No doubt the appellant who is a party to the proceedings should have been a little more careful, but that does not disclose any deliberate attempt on his part to mislead this Court. Further the statement regarding valuation is not of much consequence in this case because the questions arising for decision are really points of law regarding applicability of either the Berar or Bombay Acts. Therefore, Mr Gupta has not been able to make out a case for cancelling the Special Leave already granted.

14 We will now proceed to consider the appeal on merits. The suit land was originally in the Vidarbha Region, which before the passing of Bombay Act of 1958 was part of the State of Madhya Pradesh and the tenure of the appellant was governed by the Berar Act. As proceedings had been taken by the 5th respondent for evicting the appellant and for possession of the land under the Berar Act, it is necessary to refer to some of the material provisions of that statute.

15 Section 2 (h) defines a protected lessee as a protected lessee within the meaning of section 3. Section 3 enumerates various lessees who are protected lessees. There is no controversy that the appellant before us was a protected lessee under the Berar Act. Section 8 (1) enumerates in clauses (a) to (g) the grounds on which the lease of a land held by a protected lessee can be got terminated under the orders of a Revenue Officer. One of the grounds for eviction is pro-

vided under clause (g) of section 8 (1) namely, lessee having been served with the notice by a landholder as provided in section 9. Section 9 deals with the right of the landholder to terminate the lease of a protected lessee. Sub-sections (1) and (b) of the said section which are material for the present purpose are as follows:

"Right of landholder to terminate lease of a protected lessee—Section 9 (1). Notwithstanding anything contained in section 8 the landholder may terminate the lease of a protected lessee by giving him notice in writing delivered not less than three months before the commencement of the next agricultural year stating there in the reasons for such termination and the description of the area in respect of which it is proposed to terminate the lease, if the landholder requires the lands for cultivating the land personally.

* * * * *

Section 9 (6)—If on re-entering upon any land after termination of the lease of a protected lessee in accordance with this section, a landholder fails at any time during such period as may be prescribed to utilise the land for the purpose for which the lease was terminated, the dispossessed lessee may apply to the Revenue Officer to put him in possession of the land from the commencement of the agricultural year next following and the Revenue Officer shall after hearing the landholder and making such enquiry as he deems fit put the lessee in possession of the land if he is satisfied of the failure and also award him such sum by way of compensation as the Revenue Officer may consider sufficient."

16 Section 19 (1) provides for a landholder applying to the Revenue Officer to eject a protected lessee against whom an order for the termination of the lease had been passed under section 8 or 9. Section 22 gives power to the State Government to make rules as stated therein. Under clause (3) of section 22 (2) rules can be made regarding 'the period under sub section (6) of section 9'. Rules have been framed under section 22 and in particular rule 9 prescribes 'such

period as that of two years'. Hence it will be seen that section 9 (6) read with rule 9 requires the landholder who terminates the tenancy of his protected lessee on the ground that the land was required by him for his personal cultivation, to cultivate the land personally for a period of two years. Under the Berar Act, after having entered upon the land, if the landholder fails to cultivate the land personally during the above period, then section 9 (6) confers a right on the former protected lessee to apply to the Revenue Officer for being restored to possession.

17. We have already indicated that the Bombay Act came into force on 30th December, 1958. The material provisions to be referred to in the said statute are sections 52 (1) and 132. Section 52 (1) runs as follows:

"Landlord to restore possession if he fails to cultivate within one year.—

Section 52 (1) : Where after terminating the tenancy of any land under section 9 of the Berar Regulation of Agricultural Leases Act, 1951, or under section 38, 39 or 39-A of this Act, the landlord has taken possession of such land and he fails to use the land for the purpose specified in the notice given under the said section 9 or as the case may be within one year from the date on which he took possession or ceases to use it at any time for any of the aforesaid purposes within twelve years from the date on which he took such possession, the landlord shall forthwith restore possession of the land to the tenant whose tenancy was terminated by him, unless he has obtained from the tenant his refusal in writing to accept the tenancy on the same terms and conditions or has offered in writing to give possession of the land to the tenant on the same terms and conditions and the tenant has failed to accept the offer within three months of the receipt thereof:

Provided that no refusal of the tenant shall be valid unless it has been verified before the Tahsildar in the prescribed manner."

18. Section 132 relates to repeals and savings. Sub-section (1) states that the provisions of the enactments specified in Schedule I are repealed to the extent

specified in column 4 of the said Schedule. It may be stated at this stage that one of the enactments so repealed was the Berar Act in its entirety. Sub-section (3) is not relevant. Sub-section (2) of section 132 on which reliance has been placed by both the parties is as follows:

"Repeals and Savings.—Section 132 (2) : Nothing in sub-section (1) shall, save as expressly provided in this Act, affect or be deemed to affect—

(i) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act; or

(ii) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability or anything done or suffered before the commencement of this Act,

and any such proceedings shall be instituted, continued and disposed of, as if this Act had not been passed."

19. We have already referred to the fact that the 5th respondent had issued the necessary notice terminating the tenancy of the appellant on 28th December, 1955, under section 9 (1) and after initiating proceedings under section 8 (1) (g) read with section 19 (1), he obtained an order for possession as against the appellant from the Revenue Officer on 15th May, 1956, and had also obtained possession of the lands on 4th April, 1957. All these proceedings were under the Berar Act before the coming into force of the Bombay Act. The 5th respondent continued in such possession of the lands till 21st June, 1961, on which date he transferred the suit lands to the first respondent in exchange for certain other lands. The appellant filed an application for restoration seeking relief on the ground that the 5th respondent had ceased to be in possession of the lands within twelve years from 4th April, 1957.

20. Therefore the short question that arises for consideration is whether section 52 of the Bombay Act applies to those lands the possession of which was obtained by the landlord under section 9 of the Berar Act but in respect of which the period of two years' disability as imposed under section 9 (6) read with rule 9 of the Rules was not over before the coming into operation of the Bombay Act.

21 From the scheme of the Berar and Bombay Acts it will be noted that while section 52 of the Bombay Act enlarged the period of personal cultivation to 12 years, the Berar Act had provided for personal cultivation only for a period of 2 years. Under the Berar Act if the landlord does not personally cultivate for 2 years, the tenant can apply for restoration of possession from the landlord. Similarly under the Bombay Act, if the landlord had ceased to cultivate the land within a period of 12 years from the date of taking possession, the tenant can apply for restoration.

22 We have already referred to the fact that Mr Gupta, learned Counsel for the respondent, has relied on the decision of this Court in *Ramchandra v Tukaram and others*¹, in support of his proposition that section 52 of the Bombay Act applies even to cases where possession has been taken after the coming into force of the Bombay Act in pursuance of an order for restoration obtained by the landlord under the Berar Act. We have gone through the above decision and we are of the opinion that it does not lay down any such proposition. The question that arose for consideration therein was a totally different one. In that case one X was a protected lessee under the Berar Act and the landlord had terminated the tenancy under section 9 (1) on the ground of personal cultivation and had also submitted an application to the Revenue Officer under section 8 (1) (g) for an order terminating the tenancy. The Revenue Officer determined the tenancy by order, dated 2nd July, 1957 and made it effective from 1st April 1958. But before the latter date, Ordinance IV of 1957 was promulgated which in turn was replaced by the Bombay Act IX of 1958. The said Act had imposed a ban on eviction of tenants and had also stayed all such proceedings pending on the date of commencement of the said Act. The landlord had applied on 15th May 1958 to the Naib Tahsildar for an order for restoration of possession of the land by the tenant. The Bombay Act, which repealed the Berar Act and the Bombay Act IX of 1958, came into force on 30th December, 1958 on which date the application filed by the landlord for

restoration was pending before the Naib Tahsildar. There was a controversy as to the nature of relief that could be granted to the landlord. Having due regard to section 132 (2) (ii) and (3) of the Bombay Act, this Court held that the application, filed by the landlord for restoration of possession on the basis of the order obtained under section 8 (1) (g) of the Berar Act and which was pending when the Bombay Act came into force must be treated as an application under section 19 of the Berar Act and had to be tried and disposed of by the appropriate authority. This Court further held that the application of the landlord being a pending proceeding in respect of a right acquired before the Bombay Act, it had to be continued and disposed of as if the Bombay Act had not been passed. It was further held that in so disposing of the application, treating it as one under section 19 of the Berar Act, there was no scope for the application of the conditions and restrictions prescribed by sub sections (3) and (4) of section 38 of the Bombay Act as those provisions do not apply to proceedings to enforce rights acquired when the Berar Act was in operation. This judgment, in the opinion, does not support the landlord in the case before us.

23 We have already referred to the fact that the High Court, in its order under appeal, has held that section 52 of the Bombay Act does not apply to the present case as the landlord had cultivated the land for two years though a part of that period was after the commencement of the Bombay Act. The High Court has also stated that section 52 of the said Act will have no application to the case on hand inasmuch as the landlord had obtained possession on 4th April, 1957, long before the coming into force of the Bombay Act. For this proposition, the High Court has relied on an earlier decision of a Full Bench of the same Court in *Saraswati Bai Babji Tukaram Umekar v Bhikamchand Prensukhdas*¹. According to Dr Barlingay, the High Court's view that even if a landlord completes the period of two years personal cultivation, as required under section 9 (6) of the Berar Act, after the coming into force of the Bombay Act, the larger

¹ (1966) 1 S.C.R. 594 (1966) 1 S.C.J. 357,

¹ (1966) 68 Bom. L.R. 954 (F.B.)

period provided under section 52 does not apply, is not correct. We have already stated that Dr. Barlingay has further urged that the Full Bench decision of the Bombay High Court does not apply and if that applies, the said decision must be held to be erroneous.

24. As the decision under appeal is substantially rested on the decision of the Full Bench, it is necessary to examine the scope of the Full Bench decision. But we may straightaway say that the High Court's view that the Full Bench has held that section 52 will not apply to cases where the two years' period is completed even after the Bombay Act came into force is not correct, because the Full Bench has not laid down any such proposition. The Full Bench has only held that section 52 applies to cases where a landlord takes possession of the land on determination of a tenancy either under section 9 of the Berar Act or under sections 38, 39 or 39-A of the Bombay Act after the latter Act has come into force.

25. The facts in the Full Bench case were briefly as follows: X, a landlord obtained possession on 3rd July, 1955 of certain lands from his tenant under the Berar Act on the ground that he required the same for personal cultivation. After the death of X on 28th December, 1955, his heirs inherited the property and continued in possession of the same till 9th February, 1959, on which date they sold the lands to one S. After purchase by S, the original tenant applied under section 52 of the Bombay Act for restoration of possession on the ground that the landlord had ceased to use the property for a period of 12 years as required by the section. The heirs of X and the purchaser S, were both made parties to the said application and relief was asked for against both of them. At this stage it may be mentioned that the Bombay Act came into force on 30th December, 1958.

26. From the facts stated above, it will be seen that the landlord had obtained possession from the tenant on 3rd July, 1955 and he and his heirs had completed the requirement of section 9 (6) of the Berar Act, namely, two years personal

cultivation on 3rd July, 1957, long before the Bombay Act came into force. After having completed the said two years period, the heirs were in possession not only on the date of coming into force of the Bombay Act, but also till the date of sale to S. (9th February, 1959). The question naturally arose whether section 52 of the Bombay Act will apply when the two years' period under the Berar Act had expired before 12th December, 1958. There appears to have been earlier single Judge's decisions of the Bombay High Court holding that section 52 of the Bombay Act will apply to cases where possession has been taken after the Bombay Act had come into force and also to cases where the period of 2 years' personal cultivation by the landlord had been completed even before the coming into force of the Bombay Act. Mr. Justice Wagle, before whom the matter came in the first instance expressed doubt about the correctness of the earlier decisions. Mr. Justice Wagle was inclined to take the view that section 52 of the Bombay Act would apply only to those lands, the possession of which was obtained by the landlord under section 9 of the Berar Act, but in respect of which the period of two years' disability as imposed under section 9 (6) read with rule 9 of the Rules was not over before the coming into force of the Bombay Act. As the learned Judge was inclined to take a view, which was in conflict with the previous view of the Bombay High Court, he referred the matter to a Division Bench, which in turn referred the matter to the Full Bench.

27. From what is stated above, it will be seen that in that case possession of the lands was taken by the landlord, from the tenant under the Berar Act and the two years' period as required under section 9 (6) of the said Act had also expired before the coming into force of the Bombay Act. The transfer in favour of S., no doubt, was made long after 28th December, 1958. In the case before us the landlord had obtained possession under the Berar Act on 4th April, 1957 and he had not completed the two years' period under section 9 (6) of the Berar Act on 30th December, 1958. We are only referring to these dates to show that the Full Bench decision did not have occasion to directly tackle the problem

that arises for consideration before us. But nevertheless there are certain broad principles laid down in that decision, the correctness of which will have to be considered by us. The Full Bench posed the following two questions for consideration

" 1. Whether the provisions of section 52 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act 1958 are attracted to cases where the lease of a protected lessee had been determined by the landholder under section 9 of the Berar Regulation of Agricultural Leases Act, 1951 and possession thereof taken prior to the date the new Tenancy Act came into force and the landholder continued to personally cultivate the land on the date the new Act came into force

2. If the answer to the first question is in the affirmative, whether the expiry of two years prior to the coming into force of the new Act would have any bearing on the application of section 52 "

The first question, it will be noted, refers to the effect of taking possession by the landlord before 30th December, 1958 and his still being in possession on the date of the coming into force of the Bombay Act. The second question refers to the effect of the expiry of two years prior to the coming into force of the Bombay Act.

28. So far as the first question is concerned, the learned Judges held that section 52 of the Bombay Act would be attracted only to such cases where a landlord takes possession after determination of tenancy either under section 9 of the Berar Act or under sections 38, 39 or 39-A of the Bombay Act, after the Bombay Act has come into force. So far as the second question is concerned the learned Judges have not expressed any opinion on the ground that it does not survive on the view expressed by them on the first question.

29. It will be noted from a reading of the Full Bench judgment that the learned Judges have placed considerable emphasis for the applicability of section 52 of the Bombay Act about the landlord taking possession after the Bombay Act has come

into force. If possession had been taken before 30th December, 1958, according to the Full Bench, section 52 does not apply, whereas if possession is taken after the said date, the said section will apply. For coming to this conclusion the Full Bench has given considerable importance to the fact that section 52 refers also to sections 38, 39 and 39-A of the Bombay Act and that it uses the expression 'landlord has taken possession of such land and he fails to use the land'. These expressions, according to the Full Bench, can refer only to cases of lands taken possession by a landlord after the Bombay Act has come into force as section 52 is not retrospective.

30. In our opinion, the Full Bench has too broadly stated the principles regarding the circumstances under which section 52 of the Bombay Act will apply. If taking possession of the land by the landlord after 30th December, 1958, is the sole test for the applicability of section 52, the position, in our view, will be very anomalous. For instance if a landlord had taken possession on 29th December, 1958, section 52 will not apply and the requirement of two years' personal cultivation may not also become necessary as the Berar Act stands repealed as on 30th December, 1958. Similarly if the landlord had taken possession and had also complied with the requirement of two years' personal cultivation long before 30th December, 1958, but nevertheless if he is in possession of the land on 30th December 1958, according to the Full Bench, section 52 will stand attracted. No doubt the Full Bench has not answered the second question posed before it, but the reasoning of the decision will be to that effect if the test of possession on 30th December, 1958 is the only criteria.

31. We are of the opinion that the question of section 52 being retrospective or not has no material bearing in interpreting that section. That section had necessarily to refer sections 38, 39 and 39-A as they were also provisions enabling a landlord to get possession from a lessee. It is in the light of these matters that the expressions occurring therein have to be given their natural meaning. The Full Bench has misinterpreted that section.

32. In interpreting section 52, in our opinion, section 132 (2) (i) will be helpful. The obligation of the landlord when he takes possession of the land from the tenant under the Berar Act is to cultivate it personally for two years and once the landlord complies with that requirement before the Bombay Act came into force, the tenant's right to get restoration stands extinguished as the landlord has discharged his obligation.

33. Section 52 of the Bombay Act extends the period of personal cultivation to 12 years to all cases to which it applies. If the landlord had taken possession under the Berar Act, there was an obligation on him to cultivate personally for two years and if he had not so cultivated, the tenant had acquired a right to be restored to possession. That right which has been acquired by the tenant or accrued to him before the commencement of the Bombay Act is saved under section 132 (2) (i). Similarly, if the landlord had cultivated the lands personally for the required period, before the Bombay Act came into force, the landlord had acquired a right not to be disturbed from his possession thereafter. That right again, which has been acquired by the landlord or accrued to him, has been saved under section 132 (2) (i). Having due regard to the provisions of the two statutes and what has been stated by us earlier the position is that if the landlord on 30th December, 1958 had completed the two years period of personal cultivation, his right is not to be disturbed, is continued and preserved under section 132 (2) (i) of the Bombay Act. Again if the landlord in pursuance of an order obtained under the Berar Act, takes possession, after the commencement of the Bombay Act, section 52 applies to him and his original obligation to cultivate personally for two years under the Berar Act gets extended by the 12 years period provided under that section. If he ceases to so cultivate within the period of 12 years from his taking possession, the tenant gets a right to apply for restoration of the land.

34. The several aspects enumerated above have not been considered by the Full Bench of the Bombay High Court and it has rested its decision for applying section 52 by applying the sole test whether the landlord has taken possession

before or after 30th December, 1958. Such a test is not warranted by the provisions of both the statutes read together. A fair reading of section 52 also, in our opinion, leads to the same conclusion. Section 52 provides for:

(i) the tenancy being terminated under section 9 of the Berar Act;

(ii) the landlord taking possession of such land on the basis of such termination of the tenancy;

(iii) the landlord failing to use the land for the purpose specified in the notice under section 9 of the Berar Act;

(iv) failure to use the land for the purpose mentioned in the notice within one year from the date on which he took possession;

(v) the landlord ceasing to use the land for the purpose for which he obtains possession within 12 years of his taking possession.

35. To the case of a landlord who had already completed two years personal cultivation before 30th December, 1958, the requirement of his failing to use the land for the purpose specified in the notice under section 9 within one year from the date of his taking possession, will have no application whatsoever. The normal and reasonable construction to be placed upon section 52 is that it will apply only to cases of lands, the possession of which was obtained by the landlord under section 9 of the Berar Act, but in respect of which the period of two years disability imposed under section 9 (6) read with rule 9 of the Rules was not over before the coming into force of the Bombay Act. In respect of such landlord, section 52 enlarges the period for which he is required to personally cultivate the lands. In this respect we are inclined to agree with the view of Mr. Justice Wagle.

36. To conclude section 52 applies to all cases where possession is taken by the landlord on or after 30th December, 1958 on the basis of an order obtained under the Berar Act. It applies (also) to cases where possession had been taken by a landlord under the Berar Act but the two years period of personal cultivation had

not been completed when the Bombay Act came into force. The instances of obtaining possession under sections 38, 39 or 39-A of the Bombay Act have not been considered by us in this appeal.

37 It follows that section 52 of the Bombay Act applies to the case before us, as the landlord had not completed two years' personal cultivation on 30th December 1958, the date on which the Bombay Act came into force. He had taken possession on 4th April, 1957, and the two years' period will expire only on 4th April, 1959. In the meanwhile the Bombay Act had come into force on 30th December 1958. Under section 52 the period of personal cultivation had been extended to 12 years from the date of taking possession. But as the 5th respondent who obtained possession for personal cultivation had transferred the suit lands to the 1st respondent on 21st June 1961 on which date the 12 years' period had not expired, the appellant tenant was entitled to apply for restoration on the ground that the said landlord had ceased to cultivate the lands for the required period as provided under section 52.

38 In the result the judgment and order of the High Court are set aside and the orders of the Special Deputy Collector and the Maharashtra Revenue Tribunal are restored and the appeal allowed.

39 Though normally costs should follow the event, in this case though the appellant succeeds we decline to award him costs, as we are of the view that he should have been more careful in giving the valuation in the Special Leave petition.

V K ——— *Appeal allowed*

THE SUPREME COURT OF INDIA (Civil Appellate Jurisdiction)

PRESENT — *J C Shah, K S Hegde and A N Grover, JJ*

Bhagwan Dass (dead) by his legal representatives and others *Appellants**

v

Chet Ram *Respondent*

(A) *Punjab Pre-Emption Act (I of 1913), section 15 (1) (a), Fourthly—Right of pre-emption of tenant—When available—Tenancy must subsist till date of decree—Decree for eviction of tenant after sale but before suit for pre-emption—Right of pre-emption, if lost*

A tenant can get a decree for pre-emption under section 15 (1) (a), *Fourthly* only if his tenancy remains intact upto the date of the passing of the decree and if he loses his tenancy right at any time before the decree was granted his suit must fail. [Para 6]

Kashmiri Lal v Chuhan Ram, (1970) 72 P L R 325 and Sahan Singh v Udho Ram, (1967) 69 P L R 414, Overruled

Sale alone does not and cannot divest a tenant of his right to hold the land of which he is in possession by virtue of his tenancy under the vendor. But if his tenancy is determined by a decree for eviction he loses his status of a tenant. He then does not satisfy the first requirement of section 15 (1) (a), *Fourthly*, that he is a tenant who holds the land. In that situation he cannot succeed in a pre-emption suit if the decree for eviction has been passed after the sale but before the institution of the suit (as in the instant case) or during its pendency and before the date of the decree. This would be so by applying the well-established rule which has become a part of the law relating to pre-emption.

[Para 7]

(B) *Constitution of India, (1950), Art 136—Question involving investigation into matters of fact and not raised in Courts below—Cannot be raised in appeal under Article 136 [Para 9]*

Appeal by Special Leave from the Judgment and Order, dated the 15th

December, 1969, of the Punjab and Haryana High Court in R.S.A. No. 1949 of 1968.

S. C. Manchanda, Senior Advocate (*S. K. Mehta* and *K. L. Mehta*, Advocates of *M/s. K. L. Mehta & Co.*, and *K.R. Nagaraj*, Advocate with him), for Appellants.

Rameshwar Dial, *S. K. Bagga*, *S. D. Sood* and *Mrs. S. Bagga*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Grover, J.—This is an appeal by Special Leave from a judgment of the Punjab and Haryana High Court.

2. In December, 1966, Labhu Ram who was the owner of the land in dispute sold the same in two lots to Bhagwan Das (deceased) now represented by his legal representatives and others. The lands mentioned in clauses (a) and (b) of the title of the plaint in the suit out of which the present appeal has arisen were sold for Rs. 20,000 and Rs. 1,000 respectively. The respondent Chet Ram was a tenant-at-will of the lands covered by the sales. Bhagwan Das and others filed a suit against Chet Ram in the revenue Court for ejectment under section 14-A (i) read with section 9 (1) of the Punjab Security of Land Tenures Act, 1953 which was decreed on 31st July, 1967. On 31st August, 1968, Bhagwan Das and others entered into possession of the aforesaid lands after evicting Chet Ram by virtue of the decree for eviction obtained against him.

3. After his eviction Chet Ram the present respondent filed a suit for possession of the lands which were the subject-matter of sale by pre-emption under section 15 (1) (a) *Fourthly* of the Punjab Pre-emption Act, 1913 (Punjab Act I of 1913), hereinafter called the 'Act'. By that provision the right of pre-emption has been declared to vest in the tenant who holds under tenancy of the vendor the land or property sold or a part thereof. It was admitted before the trial Court that the respondent was a tenant before 31st July, 1967 and that before the institution of the pre-emption suit his tenancy had been determined. The trial Court dismissed the suit. On appeal the learned Additional District Judge, in view of certain decisions of the Punjab High Court, allowed the appeal

and decreed the suit. The judgment was upheld in second appeal by the High Court.

4. The sole question for determination is whether a person who has ceased to hold the land sold as a tenant can succeed in a suit for possession by pre-emption under section 15 (1) (a) *Fourthly*. The Punjab and Haryana High Court in *Kashmiri Lal and others v. Chuhan Ram*¹, had expressed the view that in a suit based on a right under the aforesaid clause the plaintiff was required to prove only that he was a tenant under the vendors on the date of the sale and not at any time thereafter as he could not remain a tenant under the vendors after they had sold the property. In certain other judgments delivered by learned Single Judges of the Punjab High Court it had been recognised that the rule was firmly established in the law relating to pre-emption that a pre-emptor in order to succeed must have a right to pre-empt not only at the time of sale but also at the institution of the suit and the passing of the decree by the trial Court. In other words, the pre-emptor's right should subsist up to the date of the passing of the decree and if he lost that right at any time before the decree was granted his suit must fail. These learned Judges of the High Court, however, considered that the language of section 15 (1) (a) *Fourthly* showed that the Legislature intended to depart from the well settled principle mentioned before and all that has to be seen is whether the plaintiff was a tenant of the vendor on the date of sale (see *Sohan Singh v. Udho Ram and others*)².

5. In *Hans Nath and others v. Ragho Prasad Singh*³, it was laid down by the Privy Council that the decisive date as regards the right of a pre-emptor to pre-empt the sale was the date of the decree. A Full Bench of the Lahore High Court in *Thakur Madho Singh and another v. Lt. James R. R. Skinner and another*⁴, while considering the relevant provisions of the Act applied this rule to a case where a vendee had improved his status during

1. Letters Patent Appeal No 71 of 1965, decided on 19th November, 1969: (1970) 72 P.L.R. 325

2. (1967) P.L.R. 414.

3. (1932) L.R. 59 I.A. 138 : 62 M.L.J. 544 (P.C.).

4. (1942) I.L.R. 23 Lah. 155 (F.B.).

the pendency of the pre-emption suit and held that a vendee could defeat the right of a pre-emptor by improving his status at any time before the passing of the decree. The right of pre-emption is a weak one and is liable to be defeated by all legitimate means at the instance of a vendee against whose contract an inroad is being attempted by the pre-emptor. The vendee is on the defensive and is entitled to arm himself with a shield in order to protect his right. The pre-emptor is an aggressor and as he wishes to dislocate the vendee he must show that the superior right of pre-emption which he had at the date of the sale continued to remain superior at all relevant times, vide *Fazl Mohammad v Fajar Ali Khan and another*¹. In the latest full bench decision of the Punjab High Court in *Ram Lal and another v The State of Punjab and others*², the rule that a pre-emptor must maintain his qualification to preempt upto the date of the decree was recognised as well settled.

6 In the presence of the above principle which is firmly entrenched in the law of pre-emption it is difficult to conceive that the Legislature intended to depart from it in section 15 (1) (a) *Fourthly* nor has any reason been suggested for doing so. The language employed is not very happy but the clear requirement is that the tenant must hold the land as such. If his tenancy has come to an end and he has been dispossessed it can never be said that he is holding the land under tenancy of any one. The Legislature can hardly be attributed the intention of giving the right to a tenant, who has been dispossessed and whose tenancy has been determined either before or during the pendency of the suit to obtain a decree for possession by pre-emption. This is particularly so as the statutory right of pre-emption is one which attaches to the land and is not a mere personal right. There could be no basis for the Legislature giving an indefeasible right to a person who happens to be in possession of the land sold as a tenant of the vendor. His right is neither better nor worse than any other person who has been conferred that right by the provisions of section 15 of the Act. For instance, a co-sharer has

been given a right to pre-empt the sale of a share out of joint land by clause (b) *Fourthly* of section 15 (1). If a co-sharer must retain his right upto the date of the decree, which he must (see *Surjit Singh v Gurnam Singh etc*³, there is no intelligible ground for treating a tenant differently. The tenant must show his right at all material times before he can succeed in a suit for pre-emption. In other words his tenancy must remain intact and he must hold the land in his capacity as a tenant till the date of the decree.

7 It must be remembered that sale alone does not and cannot divest the tenant of his right to hold the land of which he is in possession by virtue of his tenancy under the vendor. But if his tenancy is determined by a decree for eviction he loses his status of a tenant. He then does not satisfy the first requirement of section 15 (1) (a) *Fourthly* that he is a tenant who holds the land. In that situation he cannot succeed in a pre-emption suit if the decree for eviction has been passed after the sale but before the institution of the suit or during its pendency and before the date of the decree. This would be so by applying the well established rule which, as stated earlier has become a part of the law relating to pre-emption.

8 In the present case not only a decree for eviction was passed against the respondent but he was also actually dispossessed from the land in his tenancy pursuant to the decree before he filed the pre-emption suit. We are altogether unable to see how he could be granted a decree in such a suit.

9 An attempt was made by means of G.M.P. No 4634 of 1970 on behalf of the respondents to reopen the question of the area in respect of which the decree for eviction had been passed on 31st July, 1967. It was maintained that it related only to certain Khasra Numbers which were covered by the first sale shown as clause (a) in the heading of the plaint and that there was no order relating to eviction from the land covered by the second sale mentioned in clause (b) therein. This question was never raised in the Courts below and as it involves an

¹ (1954) 1 I.L.R. 25 Lah. 473 (F.B.)

² (1966) 63 P.L.R. 345 (F.B.)

³ (1964) P.L.R. 1063

investigation into matters of fact it was not possible to allow the same to be reopened at this stage.

10. The appeal is allowed and the suit of the respondent is dismissed. In view of the nature of the points involved the parties are left to bear their own costs in this Court.

V.K. ——— *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT.—S. M. Sikri, V. Bhargava and I. D. Dua, JJ.

A. Lakshmanarao ... *Petitioner**

v.

Judicial Magistrate, First Class, Parvati-
puram and others ... *Respondents.*

(A) *Criminal Procedure Code (V of 1898), section 344—Remand under—Personal presence of accused before Magistrate—Not necessary.*

As a matter of law personal presence of an accused person before a Magistrate is not a necessary requirement for the purpose of his remand under section 344, Criminal Procedure Code, at the instance of the police, though as a rule of caution it is highly desirable that the accused should be personally produced before the Magistrate so that he may, if he so chooses, make a representation against his remand and for his release on bail.

[Para. 6.]

Raj Narain v. Superintendent, Central Jail, (1970) S.C.D. 1018, Rel. on.

(B) *Criminal Procedure Code (V of 1898), section 344 (1-A)—Constitutional validity—If clothes the Court with unfettered arbitrary and unguided power.*

The contention that section 344 (1-A) of the Criminal Procedure Code clothes the Court with an unfettered, arbitrary and unguided power is untenable. Apart from the fact that it is only when either from the absence of a witness or some other reasonable cause the Court consi-

ders it either to be necessary or advisable to postpone the commencement of the inquiry or trial or adjourn the hearing of the case that the order can be made, the Court is also required to record the order in writing giving the reasons why it thinks fit that the case should be postponed or adjourned. It is further open to the Court to impose terms and to fix the period which cannot exceed 15 days at one time. This discretion being vested in a Court of law has to be exercised judicially on well recognized principles and is immune from challenge on the ground of arbitrariness or want of guidelines. Therefore, not only are the guidelines clearly contained in the statute but the discretion being judicial is required to be exercised on general principles guided by rules of reason and justice on the facts of each case and not in any arbitrary or fanciful manner.

[Para. 8.]

(C) *Criminal Procedure Code (V of 1898), section 344—Applicability to case at the stage of investigation.*

The argument that section 344, Criminal Procedure Code, cannot apply to a case which is at the stage of investigation and collection of evidence is negated by the express language both of sub-section (1-A) to the section and the *Explanation*. Under sub-section (1-A) the commencement of the inquiry or trial can also be postponed. This clearly seems to refer to the stage prior to the commencement of the inquiry. The *Explanation* makes it clear beyond doubt that reasonable cause as mentioned in sub-section (1-A) includes the likelihood of obtaining further evidence during investigation by securing a remand.

[Para. 9.]

(D) *Criminal Procedure Code (V of 1898), section 344, Explanation—Not invalid as going beyond the scope of section 344 (1-A)—It merely serves to explain the scope of the expression 'reasonable cause'.*

[Para. 10.]

(E) *Criminal Procedure Code (V of 1898), section 344—Power to remand on accused under—If ultra vires as being arbitrary and unguided.*

The submission that there is no guideline for making a remand order and therefore,

the power to remand an accused under section 344 is *ultra vires* being arbitrary and unguided is wholly unacceptable. When a case is postponed or adjourned and the accused is in custody the Court has to exercise its judicial discretion whether or not to continue him in custody by making a remand order. The Court is neither bound to make an order of remand nor is it bound to release the accused person. The discretion to make a suitable order is to be exercised judicially keeping in view all the facts and circumstances of the case including the nature of the charge, the gravity of the alleged offence, the area of investigation, the antecedents of the accused and all other relevant factors which may appropriately help the Court in determining whether to keep the accused in custody or to release him on bail. The order of remand is thus subject to judicial discretion and the order is also subject to review by the superior Courts in accordance with law. The power conferred being judicial the absence of an express precise standard for determination of the question would not render the section unconstitutional.

[Para 11]

Petition under Article 32 of the Constitution India of for a writ in the nature of *habeas corpus*

Petitioner in person

P Ram Reddy Senior Advocate, (P P Rao, Advocate, with him), for Respondents

The Judgment of the Court was delivered by

Dua, J—The Petitioner, A Lakshmanarao, an Advocate practising at Narasipatnam in the district of Visakhapatnam in the State of Andhra Pradesh has applied under Article 32 of the Constitution for a writ of *habeas corpus* on the following averments

The petitioner while going home from the Court was arrested on 17th July, 1970 at about 12.30 in the afternoon. He was not shown any warrant at the time of his arrest. He was produced before a Judicial Magistrate, First Class, on 18th July and remanded to judicial custody under section 167 (2), Criminal Procedure Code for 15 days. At the time of remand he was informed by the Magistrate that he was accused of offences under sections 120-B, 121-A, 122 read

with 302 and 395, Indian Penal Code, in Crime No 3 of 1970 (known as Parvatipuram Naxalite Conspiracy case). This crime had been registered in January, 1970 in which more than 148 persons were sought to be proceeded against. The names of only 148 accused persons were specifically mentioned. The petitioner and one Dr. C. Ramadass were not specifically named. They were apparently included in the expression "others". On 30th March, 1970 a report was filed by the Investigating Officer describing it as a preliminary charge-sheet in which it was stated that the investigation in the case had not been completed and several accused persons had yet to be traced. This report according to the averments, does not fall under section 173 (1), Criminal Procedure Code. Even in this preliminary charge-sheet the names of the petitioner and Dr. Ramadass were not included. On 1st August when the period of the petitioner's first remand expired again no charge sheet was separately filed against him and Dr. C. Ramadass. The prosecution, however, sought extension of the period of remand. When the petitioner objected to further remand a second preliminary charge-sheet was presented to the Court on that very day specifically including the petitioner's name. His remand was thereupon extended upto 6th August and thereafter upto 20th August. On 20th August he was not produced in the Court because of want of escort and the order of remand was made in his absence. He has expressed ignorance about the period of this remand.

2 The present petition dated 22nd August, 1970 was forwarded to this Court through the Superintendent, Central Jail Rajahmundry (Andhra Pradesh). The petitioner challenges the remand orders from the 1st August onwards and claims that his detention is illegal and that he is entitled to be set at liberty. The remand order dated 20th August, 1970 which was made in his absence because he could not be produced before the Court on the ground of lack of escort is challenged on the further ground that the law does not permit remand orders without the actual production of the accused before the Court.

3 According to the petitioner who himself argued his case, section 344 (1-A),

Criminal Procedure Code, does not contain any guidelines for the Court in the matter of remand orders and he added that this section is otherwise too inapplicable to the investigation stage of criminal cases. When his attention was drawn to the *Explanation* to section 344, according to which the likelihood of further evidence being obtained by the remand in cases of suspicion against an accused person raised by the evidence already obtained he contended that the *Explanation* could not as a matter of law serve to extend the scope of the substantive provision contained in sub-section (1-A). On this premise the petitioner questioned the vires of section 344 (1-A) and (2) and the *Explanation*.

4. In the counter-affidavit sworn by the Judicial Magistrate in whose Court the case against the petitioner is pending, while referring to the proceedings held on 1st August, 1970, it is affirmed that the petitioner and Dr. C. Ramadass were produced in Court and it was submitted by them that since their names had not been shown in the preliminary charge-sheet the Court had no power to extend the period of remand. On that very day the prosecution filed a second preliminary charge-sheet in which the petitioner and Dr. C. Ramadass were shown as accused numbers 149 and 150 suspected of having committed offences under sections 120-B, 121-A, 122 read with 302 and 395, Indian Penal Code. The Court thereupon passed an order of remand in respect of both of them. A bail application filed on behalf of the petitioner and Dr. C. Ramadass was thereafter argued by the petitioner and the matter was adjourned to 6th August, 1970, for orders when that application was disposed of.

5. On behalf of the other respondents a lengthy affidavit has been sworn by S. Veerananayareddi, Deputy Superintendent of Police, Crime Branch, C.I.D., Government of Andhra Pradesh, Hyderabad. It is affirmed in this affidavit that the petitioner is an active Naxalite and along with others is accused of charges under sections 120-B read with sections 302, 395, 397, 399, 364, 365, 368 and 386, Indian Penal Code in P.R.C. No. 3 of 1970, pending in the Court of the Judicial First Class Magistrate, Parvatipuram Taluk. A separate complaint

under sections 121-A and 120-B read with 121, 122, 123 and 124-A, Indian Penal Code, is also stated to have been filed against the aforesaid persons including the petitioner in the same Court in P.R.C. No. 8 of 1970. These two cases are known as Parvatipuram Naxalite Conspiracy Cases and relate to 46 murders, 82 dacoities, 99 attacks on police and 15 abductions committed by the accused persons in Andhra Pradesh. The accused persons are also alleged to have committed several offences of the types just mentioned in the Agency Tracts of Orissa bordering, Andhra Pradesh. The Government of Andhra Pradesh had on account of the gravity of the situation declared certain areas affected by the Naxalite menace in Srikakulam and Warangal District as disturbed areas under section 3 of the Andhra Pradesh Suppression of Disturbances Act, 1948. In the affidavit certain incidents have been traced from 1964 and it is affirmed that as a result of various political developments certain volunteers were recruited from various parts of Andhra Pradesh and the petitioner helped them in creating revolutionary bases in the agency tracts of Visakhapatnam District. There is also reference to one of the accused persons having become an approver and another having made a confessional statement. After stating various facts discovered during investigation it is affirmed that the investigation of this case is limited not only to the State of Andhra Pradesh but it extends to several States where Naxalite movement has spread, including West Bengal and Orissa, and as many as 900 witnesses have already been examined during the course of investigation, which has taken nearly nine months. Sanction of the State Government has also been obtained for the prosecution of the petitioner and the other accused persons under section 196, Criminal Procedure Code. On 12th October, 1970, the investigation was completed and a final charge-sheet filed in the Court of the Judicial Magistrate in P.R.C. No. 3 of 1970. The separate complaint against the petitioner and other accused persons mentioned earlier was also filed in the Court of the Judicial Magistrate under sections 121-A, 120-A read with 121, 123, and 124-A, Indian Penal Code, on the same day. It is admitted that the preliminary charge-sheet is not covered by section 173 (1),

Criminal Procedure Code But it is averred that it is only a report pending further investigation seeking extension of remand under section 344, **Criminal Procedure Code** The long period of investigation has been ascribed to the fact that there was an organised attempt on the part of the accused and their followers to thwart the efforts of the authorities in bringing the accused to book. It is admitted that the petitioner is lodged in Central Jail, Rajahmundry and that on 20th August, 1970 he could not be produced before the Court for lack of escort. The remand is also admitted to have been extended by the Magistrate, respondent No. 1 from time to time on 3rd and 17th September, and 1st October 1970. The Court it is pleaded, is empowered to pass an order of remand even in the absence of the accused under section 344, **Criminal Procedure Code**, unlike the remand order under section 167, **Criminal Procedure Code**. Incidentally, in this counter-affidavit there is a reference to the prejudicial activities in which the petitioner has been indulging in connection with Naxalite movement. The initial non-inclusion of his name in the array of accused persons has been explained on the ground that sufficient corroboration of the approver's testimony incriminating the petitioner was not forthcoming at that stage.

6 In so far as the question of legality of the remand order dated 20th August, 1970 without producing the petitioner before a Magistrate is concerned, the point is concluded by a recent judgment of this Court in the case of *Ray Narain v Superintendent Central Jail, New Delhi*.¹ In that case this Court by majority expressed the view that as a matter of law personal presence of an accused person before a Magistrate is not a necessary requirement for the purpose of his remand under section 344 **Criminal Procedure Code**, at the instance of the police, though as a rule of caution it is highly desirable that the accused should be personally produced before the Magistrate so that he may, if he so chooses, make a representation against his remand and for his release on bail. The Court on a review of the decided cases observed —

"There is nothing in the law which required his personal presence before the Magistrate because that is a rule of caution for Magistrates before granting remands at the instance of the police. However, even if it be desirable for the Magistrates to have the prisoner produced before them, when they recommend him to further custody, a Magistrate can act only as the circumstances permit."

7 The order of remand dated 20th August 1970, was in the circumstances not contrary to law so as to render the petitioner's custody illegal justifying his release by this Court on *habeas corpus*. It is unnecessary to point out that it was and still is open to the petitioner to apply for his release on bail to the appropriate Court in accordance with law, there being no illegal obstacle in his way in this respect.

8 The challenge to the constitutional validity of section 344 (1-A), **Criminal Procedure Code** is also in our opinion misconceived. Section 344 reads

"(1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible and in particular, when the examination of witnesses has once begun the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded

(1-A) If from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time

Provided further that when witnesses are in attendance no adjournment or postponement shall be granted, without

examining them, except for special reasons to be recorded in writing.

(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate.

Explanation.—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand."

Sub-section (1-A) was originally numbered as sub-section (1). The present sub-section (1) of section 344 was added by the Amending Act XXVI of 1955 when the original sub-section (1) was re-numbered as sub-section (1-A). The impugned sub-section vests in the Court seized of a criminal case power to postpone the commencement of or adjourn any inquiry or trial before him by order in writing stating the reasons therefor from time to time on such terms as the Court thinks fit and for such time as it considers reasonable. When the case is so postponed or adjourned the Court may also by a warrant remand the accused, if in custody. This judicial power to postpone or adjourn the proceedings is to be exercised only if from the absence of witnesses or any other reasonable cause the Court considers it necessary or advisable to do so. Reasonable cause for remand according to the explanation to this section covers a case where sufficient evidence is obtained to raise a suspicion about the complicity of an accused person in the offence and it appears likely that more evidence may be obtained by remand. The Court has in the exercise of its judicial discretion in granting or declining postponement or adjournment of the case and in ordering remand of the accused to keep in view all the relevant facts and circumstances of the case. The petitioner strongly contended that this section cloths the Court with an unfettered, arbitrary and unguided power. A plain reading of the section shows the untenability of the submission. Apart from the fact that it is only when either from the absence of a witness or some other reasonable cause the Court considers it either to be necessary or advisable to postpone the commencement of the inquiry or trial or adjourn the

hearing of the case that the order can be made, the Court is also required to record the order in writing giving the reasons why it thinks fit that the case should be postponed or adjourned. It is further open to the Court to impose terms and to fix the period which cannot exceed 15 days at one time. This discretion being vested in a Court of law has to be exercised judicially on well-recognised principles and is in our view immune from challenge on the ground of arbitrariness or want of guidelines. In our opinion, therefore, not only are the guidelines clearly contained in the statute but the discretion being judicial is required to be exercised on general principles guided by rules of reason and justice on the fact of each case and not in any arbitrary or fanciful manner. It may also be remembered that if the discretion is exercised in an arbitrary or unjudicial manner remedy by way of resort to the higher Courts is always open to the aggrieved party.

9. The second limb of the challenge is based on the contention that section 344 falls in Chapter 24, Criminal Procedure Code, which contains general provisions as to inquiries and trials. According to this submission this section cannot apply to a case which is at the stage of investigation and collection of evidence only. This argument appears to us to be negatived by the express language both of sub-section (1-A) and the explanation. Under sub-section (1-A) the commencement of the inquiry or trial can also be postponed. This clearly seems to refer to the stage prior to the commencement of the inquiry. The explanation makes it clear beyond doubt that reasonable cause as mentioned in sub-section (1-A) includes the likelihood of obtaining further evidence during investigation by securing a remand. The language of section 344 is unambiguous and clear and the fact that this section occurs in Chapter 24 which contains general provisions as to inquiries and trials does not justify a strained construction. Indeed, postponement of an inquiry also seems to be within the contemplation of the general provisions as to inquiries and trials. So this challenge also fails.

10. The suggestion that the explanation could not extend the substantive provisions of sub-section (1-A) has merely to be stated to be rejected because the *explan-*

tion merely serves to explain the scope of the expression *reasonable cause*

11 The last submission that there is in any event no guideline for making a remand order and therefore, the powers to remand an accused person under section 344 is *ultra vires* being arbitrary and unguided is wholly unacceptable. When a case is postponed or adjourned and the accused is in custody the Court has to exercise its judicial discretion whether or not to continue him in custody by making a remand order. The Court is neither bound to make an order of remand nor is it bound to release the accused person. The period of remand is in no case to exceed 15 days at a time. The discretion to make a suitable order is to be exercised judicially keeping in view all the facts and circumstances of the case including the nature of the charge, the gravity of the alleged offence, the area of investigation, the antecedents of the accused and all other relevant factors which may appropriately help the Court in determining whether to keep the accused in custody or to release him on bail. The Court has to ensure the presence of the accused and a just, fair and smooth inquiry and trial of the offence charged. The order of remand is thus subject to judicial discretion and the order is also subject to review by the superior Courts in accordance with law. The power conferred being judicial the absence of an express, precise standard for determination of the question would not render the section unconstitutional. Detention pursuant to an order of remand which appropriately falls within the terms of section 344 is accordingly not open to challenges in *habeas corpus*.

12 After we had reserved orders the petitioner forwarded to this Court through jail supplementary affidavit containing written arguments. We have gone through the affidavit but we do not find any new point requiring discussion. It only discloses a further attempt to reopen the majority decision of this Court in *Raj Narain's case*¹ by relying on the minority judgment and by submitting that section 344 (1-A) Criminal Procedure Code, offends Articles 19 (1) (d) of the Constitution. All that we need say at this

stage is that the majority view is binding on us.

13 This petition accordingly fails and is dismissed.

V K ————— *Petition dismissed*

THE SUPREME COURT OF INDIA

(Criminal Appellate Jurisdiction)

PRESENT — *S M Sikri, K S Hegde and I D Dua, J*

Rajuikant *Appellant**

v

The State of Maharashtra *Respondent*

(A) *Constitution of India (1950), Article 136—Appeal under—Scope—Interference with quantum of sentence in a criminal case—Practice*

Article 136 does not confer a right of appeal on a party aggrieved by the decision of a High Court. It merely confers on the Supreme Court a discretionary power to interfere in suitable cases. For judicious exercise of this power the Supreme Court expects the High Courts to record speaking orders, however sketchy, even while summarily dismissing appeals which raise arguable points.

[Para 2]

The Supreme Court normally does not interfere with the quantum of sentence in a criminal case, an appeal under Article 136, but in the instant case as the High Court had erroneously dismissed the appeal summarily without giving reasons it went into that question as a special case.

[Para 9]

(B) *Criminal Procedure Code (V of 1898), section 410—Appeal under raising arguable points—Duty of High Court to record a speaking order*

Section 410, Criminal Procedure Code, confers a right of appeal to the High Court on a person convicted on a trial held by a Sessions Court. This right entitles the aggrieved party to challenge conclusions of facts and to claim reappraisal of evidence. It would, therefore, be conducive

to the ends of justice if the High Courts were as a general rule to let the Supreme Court have the benefit of their valuable opinion in cases which raise arguable points whether on facts or on law so as to enable the Supreme Court satisfactorily to exercise its power under Article 136 of the Constitution and dispose of the appeal finally. In the absence of a speaking order the Supreme Court may have to remand the cases to the High Courts for re-hearing and recording reasons for their conclusions to the avoidable harassment of the accused persons concerned and delay in the final disposal of criminal cases. [Para. 2.]

(C) *Penal Code (XLV of 1860), section 97—Plea of self-defence—Proof—Accused if can rely on prosecution evidence and material on record without letting in defence evidence.*

An accused person can, without calling defence evidence in support of the plea of self-defence, rely on the evidence led by the prosecution and the material on the record for showing that he had acted in self-defence. In such cases the real question which the Court is called upon to decide is whether on proper appraisal of the evidence and the relevant material on the record it can be said that the accused has been proved to be guilty beyond reasonable doubt. For the Court cannot justifiably ignore the material which establishes the right of self-defence merely because the accused has for some reason or the other omitted to take such a plea. [Para. 7.]

(D) *Criminal Procedure Code (V of 1898), section 288—Evidence brought on record under—If substantive evidence—If sufficient to convict accused.*

The statements of the witnesses in the committing Court from which they resiled at the trial and which were duly brought on the record of the trial Court under section 288, Criminal Procedure Code, constitute substantive evidence and if the Court is satisfied that those statements were true whereas those made in the trial Court were untrue then the earlier statements can safely be relied upon to sustain a conviction. [Para. 8.]

Appeal by Special Leave from the Order dated the 28th March, 1968 of the Bombay High Court in Criminal Appeal No. 380 of 1968.

V.M. Tarkunde, Senior Advocate (*N.H. Hingorani* and *Mrs. K. Hingorani*, Advocates, with him), for Appellant.

M.C. Bhandare and *S.P. Nayar*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Dua, J.—This is an appeal by Special Leave from the judgment of the High Court of Judicature of Bombay dated 28th March, 1968, summarily dismissing the appellant's appeal against his conviction by the Additional Sessions Judge, Greater Bombay for offences under sections 326 and 324, Indian Penal Code. The High Court disposed of his appeal with one word "dismissed".

2 At the outset we must point out that on reading the judgment of the learned Additional Sessions Judge and the memorandum of the grounds of appeal in the High Court we felt that the summary dismissal of the appeal by the High Court with one word "dismissed" without indicating its views on the points raised in the appeal which clearly appears to us to be arguable was not right. This Court has repeatedly pointed out that when an appeal to the High Court under the Code of Criminal Procedure raises some arguable points the High Court would be well-advised to give some indication of the reasons for its view while repelling those points. Without having the benefit of the opinion of the High Court this Court is likely to feel embarrassed in dealing with those points on appeal by Special Leave [see *Mushtak Hussain v. The State of Bombay*¹, and *Challappa Ramaswami v. State of Maharashtra*²]. We would like once again to emphasise that Article 136 of the Constitution does not confer a right of appeal on a party aggrieved by the decision of a High Court, it merely confers on this Court a discretionary power to interfere in suitable cases. For judicious exercise of this power this Court expects the High Courts to record speaking orders, however sketchy, even while summarily dismissing appeals which raise arguable points. Section 410, Criminal Procedure Code, it is worth noting, confers a right of appeal

1. (1953) S.C.J. 338: (1953) S.C.R. 809 at 820.

2. (1970) 2 S.C.R. 426: (1971) Cr. L.I. 19: A.I.R. 1971 S.C. 64.

to the High Court on a person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge. This right entitles the aggrieved party to challenge conclusions of facts and to claim reappraisal of evidence. It would, therefore, be conducive to the ends of justice if the High Courts were as a general rule to let this Court have the benefit of their valuable opinion in cases which raise arguable points whether on facts or on law so as to enable this Court satisfactorily to exercise its power under Article 136 and dispose of the appeal finally. In the absence of a speaking order of the High Court this Court may have to remand the cases to the High Courts for re-hearing and recording reasons for their conclusions, to the avoidable harassment of the accused persons concerned and delay in the final disposal of criminal cases. In the present appeal to avoid further delay in the disposal of the case we chose to go into the evidence ourselves—a course which normally this Court is reluctant to adopt in appeals under Article 136—because we felt that it did *prima facie* raise arguable points.

3 The appellant Rajni alias Bal Ghanshyam Gadkar was charged with an offence of attempted murder under section 307 Indian Penal Code, for having stabbed Namdeo Keshav Padte (P W 2) with a knife on 21st June 1966. In the alternative he was charged under section 326 Indian Penal Code with the offence of having voluntarily caused the said Padte grievous hurt with a dangerous weapon (knife). He was further charged with three offences under section 324, Indian Penal Code for having voluntarily caused in the same transaction hurts to Vasant Narayan Shinde, Promod Dattaram Chavan and to Sudam Mahadeo Khanvilkar. The trial Court convicted the appellant under section 326, Indian Penal Code, instead of section 307, Indian Penal Code for stabbing Padte and sentenced him to rigorous imprisonment for four years. It also convicted him under section 324 Indian Penal Code, for causing hurt to the other three persons and sentenced him to rigorous imprisonment for one and a half years for each of the three offences. All the sentences were directed to run concurrently.

4 Shri Tarkunde learned Counsel for the appellant took us through the rele-

vant record for the purpose of showing that the assessment of the evidence by the trial Court was erroneous and, therefore, unsustainable. We were constrained to permit him to refer to the evidence as we did not have the benefit of knowing the reasons which had prevailed with the High Court in agreeing with the ultimate conclusions of the trial Court. The occurrence took place at 9 P M on 21st June, 1966 in the 10th Lane of Kerwali, Bombay and the First Information Report was lodged by Namdeo Keshav Padte (P W 2) at 10 30 P M the same night at the police station, Lamington Road. According to this report Padte's cousin Dattarya Gajanan More (P W 8) who wanted to purchase a scooter had for that purpose approached one Vinod Nimbalkar (P W 3) known to Padte. More had told Padte that the former had paid a sum of Rs. 5 or 6 thousand to the accused Rajni through Nimbalkar. The accused neither gave the scooter nor returned the money. On being approached by More for the return of the money he was put off on various pretexts. More had about two days earlier instructed Padte to go to Rajnikant with Nimbalkar to get back the money. Accordingly on 20th June, in the evening Padte contacted Rajnikant at his residence but he was told that Rajnikant had returned the money to Nimbalkar at about 3 P M. On the date of the occurrence Padte returned home at about 6 P M. He went to Nimbalkar and after taking him along, they both went to the accused. The accused was not present at his residence but they learnt from his mother that he would return at about 9 P M. Padte and Nimbalkar then went back to the latter's residence in Sikka Nagar. At about 8 45 P M when they again went to the house of the accused Chavan (P W 5) another resident of Sikka Nagar also accompanied them. Shinde (P W 4) who was known to Chavan also joined them on the way. They all went to the residence of the accused at about 9 P M but again did not find him there. While coming down from the first floor of the building they found the accused with three or four boys. Nimbalkar asked him as to when he would return the money. The accused replied that he did not recognise Nimbalkar but would settle the matter with More. On Padte's intervention the accused told him also that he did not

recognise him. When Padte insisted that he had been introduced to him by More the accused whipped out a knife from the pocket of his pants and stabbed him causing injury on the left side of his stomach and on his left hand. Thereafter the accused stabbed Shinde and then ran away. This report was actually recorded in the J.J. Hospital where R.M. Naik, S.I. Lamington Road Police Station (P.W. 10) and D.N. Patil, G.S.I attached to the same police station (P.W. 12) had gone, on learning on telephone about an assault case in the 10th Lane, Kerwadi and admission of two persons in that hospital. This information was conveyed on telephone from V.P. Road Police Station, where Padte and Shinde had been taken by their friends and from where the injured persons were taken to the J.J. Hospital in a jeep by constable Babu Parab (P.W. 9). After registering the crime at the police station both P.W. 10 and P.W. 12 went to the appellant's residence but found him absent. A watch was kept at his house. The appellant was however, arrested at Goregaon on the following day (22nd June, 1966) and was got medically examined. He had some injuries on his person.

5. An abnormal feature in this case is that these eye witnesses Shinde (P.W.4), Chavan (P.W.5) and Khanvilkar (P.W.6) who supported the prosecution case in the committing Court changed their statements at the trial in the Court of the Additional Sessions Judge. They were declared hostile and cross-examined by the prosecutor and confronted with their earlier statements from which they had resiled. Nimbalkar (P.W. 3) who had not been examined in the committing Court also declined to support the prosecution story when produced as a witness at the trial in the Court of the Additional Sessions Judge. The ground stated by him was that apprehending of violence and of assaults he had left the place of occurrence as soon as the quarrel started. He too was declared hostile and cross-examined. The evidence of Padte (P.W. 2) completely supported the prosecution case and remained unshaken. The statement of P.Ws. 4, 5 and 6 made in the committing Court were duly brought on the record under section 288, Criminal Procedure Code. When confronted with the portions of their statements

made in the committing Court, the truth of which they had denied at the trial, they merely said that they did not know how those portions came to be recorded. The trial Court after going through the material on the record came to the conclusion that the version given by Padte regarding the actual occurrence was fully established. The discrepancies on minor points were held not to affect the trustworthiness of the witness on the salient feature of the occurrence which fully brought home to the appellant his guilt. On appraisal of the entire evidence the appellant was found guilty of offences under section 326 and section 324, Indian Penal Code. Under section 326, Indian Penal Code, he was sentenced to four years rigorous imprisonment and under section 324 to one and half years rigorous imprisonment for injuries caused to each one of the three P.Ws. Shinde, Chavan and Khanvilkar. All the four sentences of imprisonment were to run concurrently.

6. In this Court on behalf of the appellant his learned Counsel Shri Tarkunde very strongly argued that the evidence on the record and the probabilities of the case show that Padte (P.W. 2) and his companions were the aggressors and the appellant was merely trying to defend himself when he attempted to catch hold of the knife with which Padte had threatened to attack him. Padte, according to the submission, got wounded as a result of the push given to him by the appellant who, during this struggle, successfully snatched his knife. Emphasis was in this connection laid on the fact that Padte and his companions were admittedly six in number and the appellant who was single-handed could not have dared to run the risk of a clash with them by starting the assault. In the alternative it was suggested that assuming the appellant had in his possession a knife of his own, as a matter of fact he was first hit by Padte (P.W. 2) with his umbrella and it was thereafter that the appellant, in order to defend himself gave the knife blow. Now this was not the plea taken by the appellant in his statement under section 342, Criminal Procedure Code, but his counsel contended that it was open to him to rely on the prosecution evidence itself for substantiating this defence. For this purpose he relied on

the evidence of Padte where he admitted that he had tried to push back the appellant with his umbrella after receiving from him the stab wound Padte, it was argued, had rightly admitted use of umbrella by him but had suppressed the truth. Instead of admitting the initial assault by him he had shifted the use of umbrella to a time after the receipt of injury by him suggesting thereby that it was used in self defence. Stress was in this connection laid on the fact that a broken umbrella was found by the investigating officers at the place of occurrence. From this circumstance support was sought for the suggestion that Padte must have hit the appellant with the umbrella with considerable force and that could only be done before he was injured. Faced with six hostile men, use of knife by the appellant after having been severely hit was, according to the Counsel, a lawful and legitimate exercise of his right of self-defence.

7 It is true that an accused person can, without calling defence evidence in support of the plea of self-defence, rely on the evidence led by the prosecution and the material on the record for showing that he had acted in self-defence. In such cases the real question which the Court is called upon to decide is whether on proper appraisal of the evidence and the relevant material on the record it can be said that the accused has been proved to be guilty beyond reasonable doubt. For, the Court cannot justifiably ignore the material which establishes the right of self-defence merely because the accused has for some reason or other omitted to take such plea. On going through the evidence and the material on the record we are however, unable to hold that the injuries in question had been inflicted on the prosecution witnesses by the appellant while acting in self defence. The injuries on the appellant's person were found, on examination by Dr V B Nair, Casualty Medical Officer in Charitable Nair Hospital on 22nd June, 1966 at about 5 P M to be a contused lacerated wound over the right scapular region $\frac{1}{2}$ " \times " $\frac{1}{4}$ " skin deep and two abrasions (a skin abrasion on the right rings finger and a linear abrasion over the left elbow.) The injury over the right scapular region indicates that it was caused to the appellant by someone hitting him from behind

and if that be so, then as suggested by the trial Court it seems more probable that in the melee following the free use of knife by the appellant, someone hit him with the umbrella when he was trying to escape after giving the knife injuries to the PWs. It could not be the result of a push as stated by Padte. There being no clear evidence on the point the Court has to go by probabilities. On this view we are unable to sustain the appellant's suggestion that he was first assaulted with umbrella. The other submission that the appellant, when threatened by Padte with knife, tried to snatch it and during the course of this struggle Padte may have accidentally been wounded in his abdomen when pushed by the appellant has merely to be stated to be rejected. The story not only sounds unrealistic but we are also unable to find on the record any rational basis for its acceptance. The nature of the stab wound in the abdomen as described by Dr Vijendra J Shankar (PW 11) also seems to negative this suggestion. The wound has penetrated into the abdominal cavity and intestinal loops were visible and were coming out. Keeping in view the nature of the scuffle it could not be accidental. The abrasions on the appellant's finger relied upon by the appellant's Counsel in support of this theory is equally unhelpful. In a struggle for snatching an open knife from another person's hostile hands one would expect more serious injuries than mere abrasions. The plea on the right of private defence must, therefore, be repelled.

8 It was then contended that the statements of the three witnesses (PWs 4, 5 and 6) made in the committing Court from which they had resiled at the trial should not have been acted upon by the trial Court in support of the prosecution version and PW 2 the only witness who did not resile from the statement in the committing Court is a highly interested witness and, therefore, his evidence should not be implicitly accepted, said the Counsel Nimbalkar (PW 3) who was produced at the trial without having been examined in the committing Court was also declared hostile and was permitted to be cross-examined by the prosecutor. His evidence, according to the appellant's Counsel, is no better and, therefore, does not add strength to the

prosecution case. This Court must, therefore, hold that the evidence on the record is not trustworthy and it does not establish the appellant's guilt beyond reasonable doubt. We are not impressed by this submission. The statements of the three witnesses in the committing Court from which they resiled at the trial and which were duly brought on the record of the trial Court under section 288, Criminal Procedure Code, constitute substantive evidence and if the Court is satisfied that those statements were true whereas those made in the trial Court, were untrue then the earlier statements can safely be relied upon to sustain the conviction. In this case a mere reading of the statements at the trial demonstrates their unconvincing nature and it seems clear that there was some ulterior motive for the witnesses to resile from the earlier statements which appear to have a ring of truth about them. We are, therefore, satisfied that the trial Court was right in convicting the appellant for offences under sections 326 and 324, Indian Penal Code.

9. On the question of sentence, however, we feel that in view of the somewhat dubious nature of the transaction which led to the occurrence and the fact that the appellant had felt somewhat annoyed at the repeated visits of P.Ws to his house where unpleasant scenes were created in the presence of his mother the sentence imposed is somewhat severe. In our opinion a sentence of two years' rigorous imprisonment would meet the ends of justice. This Court normally does not interfere with the quantum of sentence on appeal under Article 136 but in the present case, as the High Court had, in our opinion, erroneously dismissed the appeal summarily without giving reasons, we have chosen on a consideration of all the relevant circumstances to go into the question ourselves.

10. The appellant will surrender to his bail bond to serve out the remaining sentence.

V.K.

———— Order accordingly.

THE SUPREME COURT OF INDIA- (Civil Appellate Jurisdiction.)

PRESENT:—*J.C. Shah and V. Bhargava, JJ.*

Bai Chanchal and others *Appellants**
v.

Syed Jalaludin and others *Respondents.*

(A) *Bombay Rent Restriction Act (XVI of 1939), section 4 (2) (b) and section 11—Lease of vacant site—Permission given to lessee to build houses in any manner—Whether lease is for purpose of business or trade—Applicability of the Act.*

(B) *Words and phrases “business”, “trade” and “premises”.*

Admittedly, the lease of 1895 was not in respect of any building or part of a building let separately for any purpose whatever. The mere fact that there was mention that structure that might have been erected will be removed can in no way lead to a reasonable conclusion that the principal purpose of the lease was the use of the land for business or trade. The word “business” or “trade” used in the definition of “premises” in section 4 (2) (b) of the Act does not comprehend within it a lease which is merely for constructing houses. [Paras. 3 and 5.]

On facts held, that it is impossible to hold that the principal use, to which the land was to be put by the lessees, was business or trade, and that the Act was inapplicable to the lease in question.

[Paras. 4 and 5.]

(C) *Bombay Rents Hotel and Lodging House Rates Control Act (1947)—Applicability—Consent decree before the Act—Whether new tenancy created—Right of judgment debtor under the Act.*

After considering the terms of the compromise decree, it was held, that these terms, can in no way, be interpreted as creating a new tenancy constituting the decree-holders as landlords and the judgment-debtors as their tenants. The terms of the consent decree neither constituted a new tenancy nor a licence. All that the decree-holder did was to allow the judgment-debtors to continue in

possession for five years on payment of mesne profits as a concession for entering into a compromise. The language used in the consent decree contains no indication of any intention to create a new tenancy so that the Bombay Rent Control Act, 1947, could never apply to the case of the Appellants. [Paras 6 and 7]

(D) *Civil Procedure Code (V of 1908), Order 22, rule 3 and Order 12 rule 6—Scope of—More than one decree in a suit—Permissibility of*

Order 23 rule 3 *Civil Procedure Code*, clearly envisages a decree being passed in respect of part of the subject matter of the suit on a compromise, and rule 6 of Order 12 *Civil Procedure Code* permits the passing of a judgment at any stage without waiting for determination of other questions. In the same suit, there can be more than one decree passed at different stages. [Para 8]

Appeal by Special Leave from the Judgment and Decree dated the 16th January, 1969 of the Gujarat High Court in Letters Patent Appeal No. 31 of 1966

S T Desai, Senior Advocate (*M H Chhatrapati* and *P N Tiwari*, Advocates, and *O C Mathur*, Advocate of *M/s J B Dadachary & Co*, with him), for Appellants

D V Patel Senior, Advocate (*I N Shroff* Advocate with him) for Respondents Nos 1 and 3

R H Dhebar, *B Datta* and *SP Najar*, Advocates for Respondent No 2

The Judgment of the Court was delivered by

Bhargava J—The predecessors-in-interest of plaintiff respondents Nos 1 to 3 gave, in 1895 land, bearing Serial Nos 503 and 506 of Asarva within the limits of Ahmedabad Municipal Corporation on lease for a period of 49 years at an annual rent of Rs 199, to three persons, Sha Ram chandra Ambaram Pardesi Sukhlal Anandram and Mehta Bogha Mugatram. These original lessees during the currency of the lease made transfers of their rights and also granted sub-leases. A number of chawls and some other buildings were constructed on the land and some of them were let out on rent. In 1945, the lessors, after serving notice on the occupants to give vacant possession, filed a suit for recovery of

possession. The suit was decreed on 8th July, 1946, on the basis of a consent decree as against some of the occupants including the four defendant appellants. In the agreement, on the basis of which the decree was passed, it was agreed that the defendant appellants will continue in possession of the property for a period of five years and will hand over possession after the expiry of this period of five years. For this period, they undertook to pay mesne profits every month at various rates on the lands in their possession. Between them, the four appellants were required to pay @Rs 227-10-0 per mensem making up an annual amount of mesne profits of Rs 27318-0. Similar terms were included in the consent decree against other defendants who joined the compromise on the basis of which the decree was passed on 8th July, 1946. The remaining defendants in the suit entered into a later compromise and, as a result, another consent decree was passed on 28th January, 1949, against those defendants. Under this decree, these remaining defendants were also entitled to continue in possession for a period of five years from the date of the decree, but were required to pay mesne profits for this period. All the defendants governed by the two decrees dated 8th July, 1946 and 28th January, 1949, had to pay between them mesne profits monthly which worked out to an amount of Rs 7314 8-0 per annum. Before the expiry of the period of five years prescribed by either of the two decrees, the Custodian of Evacuee Property, in 1950, took possession of all the properties as one of the decree-holders had become an evacuee. After the property was released by the Custodian of Evacuee Property, an application was filed by the decree holders on 26th March, 1953 for execution of the consent decree dated 8th July, 1946, and, in that execution, possession was sought against the appellants of the property which was in their possession. Subsequently, a number of suits were filed for recovery of mesne profits also. The Execution Court directed eviction of the appellants after overruling the various objections raised by them in the execution proceedings. The decision of the Execution Court on the objections taken by the appellants

was challenged in appeal before the District Judge, in second appeal before a single Judge of the High Court of Gujarat, and by a Letters Patent Appeal before a Division Bench. All the Courts rejected the objections raised by the appellants and upheld the order of the execution Court directing delivery of possession. It is against the judgment of the Division Bench in Letters Patent Appeal in this execution that the appellants have come up to this Court in this appeal by Special Leave.

2. It is unnecessary for us to mention all the various objections that were taken at various stages by the appellants in the execution Court, in the Court of the District Judge, or before the single Judge or the Division Bench in the High Court. Only three of the points raised have been urged before us and, therefore, we are called upon to deal with these three points only.

3. The first point raised in that the decree which was passed on 8th July, 1946, was a nullity, because it was passed in contravention of section 11 (1) of the Bombay Rent Restriction Act (XVI of 1939) (hereinafter referred to as "the Act"). This objection has been overruled by the High Court on the ground that the provisions of the Act were not attracted by the lease in question on the expiry of which the suit for ejectment was decreed under the consent decree dated 8th July, 1946. Counsel appearing for the appellants urged that the terms of the decree passed as well as the terms contained in the lease-deed of 1895 show that the Act was applicable because the land, to which the suit for ejectment related, was covered by the definition of "premises" to which the Act applies. The expression "premises" is defined in section 4 (2) of the Act as meaning—

(a) any building or part of a building let separately for any purpose whatever, including any land let therewith, or

(b) any land let separately for the purpose of being used principally for business or trade.

Admittedly, the lease of 1895 was not in respect of any building or part of a building let separately for any purpose what-

ever. Reliance was placed on section 4 (2) (b) of the Act on the contention that the land had been let for the purpose of being used principally for business or trade. Having gone through the documents relied upon by Counsel for the appellants, we are unable to accept this submission. In the plaint of the suit as well as in the decree dated 8th July, 1946, there is no mention of the purpose for which the land was let out by the lease of 1895. Reliance was, however, placed on one of the pleadings in the plaint which had been reproduced in the decree in which the plaintiff-respondents recited one of the terms of the lease in the following words :—

"On the expiry of the period of 49 years, the land shall be handed over without raising any dispute or objection or causing any obstruction, after removing whatever structures that might have been erected thereon and after making it as clear as it is."

The arguments was that this pleading indicates that the land was let out for making structures and those structures could only be utilised by being let out on rent. This purpose would constitute business or trade. We are unable to see any justification for such an inference. The mere fact that there was a mention that structures that might have been erected will be removed can in no way lead to a reasonable conclusion that the principal purpose of the lease was the use of the land for business or trade.

4. Reference, in this connection, was also made to the terms of the lease of 1895; but we are unable to hold that it establishes the case of the appellants that the lease was taken principally for the purpose of using the land for business or trade. All that the lease mentions is that it is for constructing houses and, at a later stage, there is a mention that 'in the said fields, the lessees could construct houses in any manner or use it in any manner.' The other parts of the lease, on which reliance has been placed are as follows :—

"1. On the land of those fields we can build houses in any manner and we will receive income thereof and you will not raise any dispute or obstruction in respect thereof. We can spend any

amount on the construction of those houses which we will not demand from you for whatever reason nor we will have the right to deduct from rent payable to you

2 If any houses are constructed thereon, we will remove the super structures. If we do not remove the structures then you will be the owners of the said structures. If you take them, then we and our heirs and representatives will not object."

We are unable to find even in these quotations from the lease any mention that the land is going to be used principally for the purpose of business or trade. The lease does mention that it was being taken for constructing houses. There was no mention at all, however of the manner in which the constructed houses were to be utilised. Further, there is a clear option given to the lessees that they could use the land in any manner if they did not construct any houses. These are terms on the basis of which it cannot be said that the land was being let out for business purposes.

5 The submission of Counsel for the appellants was that, if the purpose was to construct houses and let them out on rent, that would constitute the use of the land for the purpose of business inasmuch as the lessees would be earning income from letting out those houses. We are unable to accept this submission, because we do not think that the word "business" or trade used in the definition of 'premises' in section 4 (2) (b) of the Act comprehends within it a lease which is merely for constructing houses. Learned Counsel cited before us a number of decisions of Indian and English Courts including decisions of the Privy Council and this Court in which the scope of the word "business" was interpreted. That interpretation was given in connection with the word "business" as used either in Income tax law or in the terms of a covenant or the Companies Act, etc. We do not consider that it will be at all profitable to refer to them when interpreting the word "business" or "trade" as used in section 4 (2) (b) of the Act, because none of those interpretations will cover a case similar to the one before us, where the lease was merely a permissive one giving a right to the lessees to construct

houses and let them out or to use the land in any manner. When the purpose of the lease was expressed in this way, it is impossible to hold that the principal use, to which the land was to be put by the lessees, was business or trade. As a consequence of this interpretation, it has to be held that the Act was not applicable to the lease of 1895 and, therefore, no question arises of the decree of 8th July, 1946 being invalid on the ground of contravening section 11 (1) of the Act.

6 The second point urged by learned Counsel was that, by the consent decree itself, a new tenancy was created which was to continue for five years and in the meantime, the Bombay Rents Hotel and Lodging House Rates Control Act, 1947, came into force and the appellants were protected from ejectment under the provisions of that Act. The consent decree does not state that a new tenancy is being created. The argument was that the terms of that consent decree should be interpreted as indicating an intention to create a new tenancy. We are unable to find any such terms. On the face of it, all that the consent decree envisaged was that though the judgment-debtors were liable to immediate eviction, the decree holders agreed to let them continue in possession for a period of five years. Since this concession was being granted as a special case, the decree holders insisted that mesne profits should be paid at a much higher rate so much so that between all the defendants, governed by the two decrees of 8th July, 1946 and 28th January 1949, the amount payable as mesne profits became Rs 7,314 8-0 per annum which had no relation with the original rent of Rs 199 per annum for the entire land fixed by the lease of 1895. In fact, the decree-holders sought further protection by requiring the judgment-debtors to pay the mesne profits in monthly instalments, and the instalments were so fixed that the mesne profits due for five years were to be paid within a period of three years. There was the further clause that, in case of default of payment of the mesne profits the defaulting judgment-debtors could be immediately called upon to deliver possession. These terms can, in no way, be interpreted as creating a new tenancy constituting the decree holders as land lords and the judgment-debtors as their

tenants. The terms of the consent decree neither constituted a tenancy nor a licence. All that the decree-holders did was to allow the judgment-debtors to continue in possession for five years on payment of mesne profits as a concession for entering into a compromise. The argument advanced must, therefore, be rejected.

7. Reference was made by learned Counsel for the appellants, in support of his argument, to a decision of the Bombay High Court in *Gurupadappa, Shiulingappa-itgi v. Sayad Akbar Sayad Budan Kadri*¹, but that case, in our opinion, has no application. In that case, in the consent decree itself, the first clause was that the defendant admits that he is a monthly tenant of the plaintiff and is to continue in possession till 31st January, 1948. This clause specifically and clearly in the language used, made it manifest that the defendant was a monthly tenant and was to continue in that capacity in possession. It was in these circumstances that it was held that a new tenancy had been created from the date of the consent decree. In the case before us, the terms of the consent decree are in no way comparable with the terms used in the consent decree in that case. The language used in the consent decree in the present case contains no indication of any intention to create a tenancy, so that the Bombay Rent Control Act, 1947, could never apply to the case of the appellants.

8. The third point raised by learned Counsel was that, since there was one single suit based on the lease of 1895 for ejectment of persons in possession, there could be only one single decree in that suit and the Court was incompetent to pass two separate decrees on 8th July, 1946 and 28th January, 1949. Counsel, in this connection, relied on the provisions of rules 1 and 12 of Order 20 of the Code of Civil Procedure which relate to the pronouncement of judgment and the Court passing a decree in a suit. These rules have really no relevance. On the other hand, rule 3 of Order 23, Civil Procedure Code, clearly envisages a decree being passed in respect of part of the subject-matter of the suit on a compromise, and rule 6 of Order 12, Civil Procedure Code, permits the passing of a judgment at any stage without waiting

for determination of other questions. Thus, it is clear that, in the same suit, there can be more than one decree passed at different stages. In the present case, the first decree of 8th July, 1946, was based on a compromise between the plaintiffs and some of the defendants, while the second decree dated 28th January, 1949, decided the rights of the remaining defendants. The two decrees were separate and independent and neither of them could be treated as a nullity.

9. In these circumstances, the execution Court was right in rejecting all the objections raised by the appellants and in directing delivery of possession. The appeal fails and is dismissed with costs.

S.V.J. ————— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*J.C. Shah and A.N. Grover, JJ.*

Bhajan Lal *Appellant**
v.

The State of Punjab and others.

Respondents.

Punjab Security of Land Tenures Act (1953), sections 14-A and 18—Scope of—Application for ejectment against tenant by landlord on grounds of arrears of rent—Tenant filing application under section 18 for purchasing lands—Subsequent order for ejectment—Right of tenant to purchase lands whether affected.

By virtue of section 14-A the land-owner may obtain possession of the land on the ground of non-payment of rent by a proceeding filed before the Assistant Collector during the subsistence of the tenancy. If the tenant has remained in continuous occupation of the land for a minimum of six years he is entitled to purchase the land under section 18 of the Act. [Para. 7.]

The expression 'notwithstanding anything to the contrary contained in any law, usage or contract in section 18', does not whittle down the right of the tenant at the date when he makes a claim to purchase the land merely because the tenancy is liable

1. (1950) 52 Bom. L.R. 143.

*C.A. No. 1338 of 1967. 28th September, 1970.

to be terminated in a proceeding then pending for an order in ejectment under section 14 A, at the instance of the landowner. Under the Act, the tenancy does not stand terminated merely because a proceeding in ejectment is instituted. The tenancy is determined only in the conditions prescribed by section 9 and in the manner provided by section 14 A. If a tenant is in default in payment of rent the land owner desiring to recover rent due by the tenant may apply in writing to the Assistant Collector who shall thereupon send a notice to the tenant to deposit the rent due or give proof of having paid it. If the tenant fails to pay the rent or give proof of payment, the Assistant Collector shall, after a summary inquiry if he is of the view that the tenant has not paid or deposited the rent, eject the tenant summarily and put the landlord in possession of the land concerned. But so long as the Assistant Collector has not passed the order ejecting the tenant the right of the tenant is not extinguished, he continues to remain a tenant and being a tenant he is entitled to exercise his right to purchase the land. [Para 8]

On facts held, Shadi was a tenant prior to the date of institution by Bhajan Lal of the proceeding in ejectment and he continues to remain a tenant till an order was passed by the Assistant Collector on 30th April 1964. But before that date Shadi had exercised his right to purchase the land and that right to purchase the land would not be defeated merely because on a date subsequent thereto an order in ejectment was passed against him. [Para 9]

Appeal by Special Leave from the Order dated the 7th March 1967 of the Punjab and Haryana High Court in Civil Writ No 326 of 1967

B R L Iyengar, Senior Advocate, (*R L Kohli* and *J C Talwar*, Advocates, with him) for Appellant

S C Manchanda Senior Advocate (*M L Aggarwal* and *N K Aggarwal*, Advocates, with him), for Respondent No 3

The Judgment of the Court was delivered by

Shah, J—Bhajan Lal was the owner of land measuring 21 bighas, 2 biswas and bearing khasra Nos 11/12, 18, 20 and

43 in village Sukhchen. Shadi was the tenant of the land for agricultural use. Alleging that Shadi had failed to pay the rent due by him for the period Kharif Season 1957 to Rabi Season 1960, Bhajan Lal applied under section 14 A of the Punjab Security of Land Tenures Act, 1953, to the Assistant Collector for an order in ejectment against Shadi. The application was dismissed by the Assistant Collector and that order was confirmed in appeal by the Collector. The Financial Commissioner set aside the order and remanded the case for a fresh decision by order dated 8th January, 1962.

2 There was yet another proceeding regarding the same lands. On 20th February, 1961 Shadi applied to the Assistant Collector to purchase the land under section 18 of the Punjab Security of Land Tenures Act, 1953. The Assistant Collector rejected the application. The Collector confirmed that order. By order dated 5th October, 1962, the Financial Commissioner remanded the case for determining whether Shadi was in occupation of the lands for six years before the date of the petition.

3 The Assistant Collector held that Shadi could claim to purchase the lands under section 18 of the Punjab Security of Land Tenures Act, 1953 on paying Rs 8409 in ten equal instalments to Bhajan Lal. The Assistant Collector held in the proceeding for ejectment started by Bhajan Lal that the tenant Shadi had without sufficient cause committed default in paying rent and ordered that he be evicted. The two orders were passed on 30th April, 1964. Whereas in the proceeding started by Bhajan Lal, he held that Shadi was liable to be evicted from the lands because he had without sufficient cause committed default in paying rent, in the proceeding filed by Shadi the Assistant Collector declared that Shadi was entitled to purchase the lands from Bhajan Lal. The two orders were challenged respectively by Shadi and Bhajan Lal in revision application filed before the Additional Commissioner. The Additional Commissioner set aside the order in favour of Shadi and dismissed the application filed by Shadi. In a revision application, the Financial Commissioner set aside the order of ejectment against Shadi and restored the order of the

Collector declaring him entitled to purchase the lands.

4. Against the order whereby Shadi was declared entitled to purchase the lands, Bhajan Lal applied to the High Court of Punjab for an order setting aside the order of the Financial Commissioner. The High Court dismissed the petition *in limine*. Bhajan Lal has appealed to this Court with Special Leave.

5. Section 9 (1) of the Punjab Security of Land Tenures Act, 1953, provides:

“Notwithstanding anything contained in any other law for the time being in force, no land-owner shall be competent to eject a tenant except when such tenant—

(i) is a tenant on the area reserved under this Act or is a tenant of a small land-owner; or,

(ii) fails to pay rent regularly without sufficient cause; or

(iii) is in arrears of rent at the commencement of this Act; or

(iv) has failed, or fails, without sufficient cause, to cultivate the land comprised in his tenancy in the manner or to the extent customary in the locality in which the land is situate; or

(v) has used, or uses the land comprised in his tenancy in a manner which has rendered, or renders it unfit for the purpose for which he holds it; or

(vi) has sub-let the tenancy or a part thereof, provided that where only a part of the tenancy has been sub-let, the tenant shall be liable to be ejected only from such part; or

(vii) refuses to execute a *Qabuliyat* or a *Patta*, in the form prescribed, in respect of his tenancy on being called upon to do so by an Assistant Collector on an application made to him for this purpose by the land-owner.

Explanation.—For the purpose of clause (iii), a tenant shall be deemed to be in arrears of rent at the commencement of this Act, only if the payment of arrears is not made by the tenant within a period of two months from the date of notice of the execution of decree or order, directing him to pay such arrears of rent.”

6. Section 14-A of the Act in so far as it is relevant provides:

“Notwithstanding anything to the contrary contained in any other law for the time being in force, and subject to the provisions of section 9-A,—

(i) a land-owner desiring to eject a tenant under this Act shall apply in writing to the Assistant Collector, First Grade, having jurisdiction, who shall thereafter proceed as provided for in sub-section (2) of section 10 of this Act, and the provisions of sub-section (3) of the said section shall also apply in relation to such application.

* * * * *

(ii) a land-owner desiring to recover arrears of rent from a tenant shall apply in writing to the Assistant Collector, Second Grade, having jurisdiction, who shall thereupon send a notice, in the form prescribed, to the tenant either to deposit the rent or value thereof, if payable in kind, or give proof of having paid it or of the fact that he is not liable to pay the whole or part of the rent, or of the fact of the landlord's refusal to receive the same or to give a receipt, within the period specified in the notice. * * * * *

7. Section 18 of the Act, in so far as it is relevant, provides:

“(1) Notwithstanding anything to the contrary contained in any usage or contract, a tenant of a land-owner other than a small land-owner—

(i) who has been in continuous occupation of the land comprised in his tenancy for a minimum period of six years, or,

(ii) who has been restored to his tenancy under the provisions of this Act and whose periods of continuous occupation of the land comprised in his tenancy immediately before ejection and immediately after restoration of his tenancy together amounts to six years or more, or

(iii) * * * * *

shall be entitled to purchase from the land-owner the land so held by him but not included in the reserved area of the land-owner, in the case of a

tenant falling within clause (i) or clause (ii) at any time, and in the case of a tenant falling within clause (iii) within a period of one year from the date of commencement of this Act

* * * * *

By virtue of section 14 A the land owner may obtain possession of the land on the ground of non payment of rent by a proceeding filed before the Assistant Collector, during the subsistence of the tenancy. If the tenant has remained in continuous occupation of the land for a minimum period of six years he is entitled to purchase the land under section 18 of the Act

8 It was urged that since section 18 commences with a *non obstante* clause, viz, Notwithstanding anything to the contrary contained in any law, usage or contract, if a proceeding in ejectment is lodged against the tenant which ultimately is allowed the tenant cannot make a claim during the pendency of the proceeding to purchase the land. To hold otherwise, it was urged, would enable a tenant in default to defeat the claim in a suit in ejectment by commencing a proceeding for purchasing the land. We do not think that the expression 'notwithstanding anything to the contrary contained in any law usage or contract' whittles down the right of the tenant at the date when he makes a claim to purchase the land merely because the tenancy is liable to be terminated in a proceeding then pending for an order in ejectment under section 14-A, at the instance of the land-owner. Under the Act, the tenancy does not stand terminated merely because a proceeding in ejectment is instituted. The tenancy is determined only in the conditions prescribed by section 9 and in the manner provided by section 14 A. If a tenant is in default in payment of rent the land owner desiring to recover rent due by the tenant may apply in writing to the Assistant Collector who shall thereupon send a notice to the tenant to deposit the rent due or give proof of having paid it. If the tenant fails to pay the rent or give proof of payment, the Assistant Collector shall after a summary inquiry if he is of the view that the tenant has not paid or deposited the rent, eject the tenant summarily and put the land-owner in possession

of the land concerned. But so long as the Assistant Collector has not passed the order ejecting the tenant the right of the tenant is not extinguished he continues to remain a tenant and being a tenant he is entitled to exercise his right to purchase the land

9 Shadi was a tenant prior to the date of the institution by Bhajan Lal of the proceeding in ejectment and he continued to remain a tenant till an order was passed by the Assistant Collector on 30th April 1964. But before that date Shadi has exercised his right to purchase the land and that right to purchase, the land would not be defeated merely because on a date subsequent thereto an order in ejectment was passed against him. Shadi had, therefore, at the date when he initiated proceeding under section 18 right to purchase the land. By the subsequent order in ejectment made against him the statutory right of Shadi was not prejudicially affected.

10 We agree with the observations of Mahajan, J, in *Har Sarup and another v The Financial Commissioner, Revenue, Punjab*¹, at page 159

'But, at the time when section 18 application was filed, no order for eviction had been passed. Therefore at that time, the relationship of land lord and tenant did exist. Mr Daulta has not been able to point to me any provision of law which would make the eviction decree operative from the date of eviction application. The mere fact that the tenants had incurred the liability for eviction by reason of non-payment of rent would not put an end to the admitted relationship of landlord and tenant between the parties. This liability only puts an end to the aforesaid relationship when the eviction decree is passed. The eviction decree was passed long after the section 18 application. Therefore, the present petition is liable to succeed only to the extent of section 18 application that is the tenants would be entitled to purchase the land * * * *'

11 But a slight modification needs to be made in the order. A proceeding for recovery of rent was commenced

against Shadi. It is not clear whether the amount of compensation determined by the Assistant Collector as payable by Shadi for purchasing the land includes the rent in arrears. We declare that Shadi will be entitled to purchase the land on payment of the amount of compensation together with the amount of rent due by him. The Assistant Collector will pass appropriate order in that behalf and direct that payment be made in appropriate instalments under section 18 (4) (a).

12. Subject to that modification, the appeal fails and is dismissed with costs.

S.V.J. ——— *Appeal dismissed.
subject to a modification.*

THE SUPREME COURT OF INDIA. (Civil Appellate Jurisdiction.)

PRESENT.—*J. C. Shah, K. S. Hegde and
A. N. Grover, JJ.*

Jagdish Prasad Shastri *Appellant**
v.

The State of U.P. and others *Respondents.*

Reversion, order of—Appellant reverted to his substantive post from the officiating higher post—Form of the order, if decisive—Letter of the Director of Panchayat Raj directing that the appellant's name be struck off the list of persons eligible for promotion, if proves mala fide of the authority.

The letter by which the appellant was reverted to the post of Panchayat Secretary, and his name was also ordered to be struck off the list of those Panchayat Secretaries maintained for promotion to the post of Panchayat Inspector, had a two-fold significance (i) it rendered some support to the plea of *mala fides*; and (ii) it lent support to the claim of the appellant that the order involved evil consequences. The direction that the appellant's name be struck off the list of Panchayat Secretaries eligible for promotion to the post of Panchayat Inspector involved very serious consequences to the appellant. Before such an order could be made it was obligatory upon the appropriate authority to give an opportu-

nity to the appellant to explain his conduct which merited punishment. Admittedly no such opportunity was given to the appellant. The order *prima facie* supported the contention of the appellant that it involved penal consequences and also that the order was made not due to exigencies of the service, but to punish the appellant because the relation between the appellant and the Director of Panchayat Raj were strained. Refusal of the High Court—on grounds not relevant—to consider the letter, an important piece of evidence in support of the case of the Appellant, after admitting it on the record has resulted in denying the appellant a fair trial. The order of the High Court suffers from serious infirmities. [Para. 8.]

Appeal by Special Leave from the Judgment and Decree dated the 19th April, 1965 of the Allahabad High Court in Special Appeal No. 138 of 1961.

G. N. Dikshit, Advocate, for Appellant.
S. C. Manchanda, Senior Advocate (*O. P. Rana*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—The appellant was appointed Panchayat Secretary in the Department of Panchayat Raj of the State of U.P. He was eligible for promotion to the post of Panchayat Inspector. On 7th January, 1959, the appellant was placed at the top of the list of Panchayat Secretaries fit for promotion to the post of Panchayat Inspector. On 22nd June, 1960, the appellant was promoted to the post of Panchayat Inspector. The order did not specify whether this appointment was officiating or substantive. On 20th August, 1960, the District Panchayat Raj Officer, Meerut, passed an order reverting the appellant to the post of Panchayat Secretary. But on protest raised by the appellant, the Director of Panchayat Raj rescinded that order and re-instated the appellant to the post of Panchayat Inspector making the appointment "officiating".

2. On 22nd January, 1961, election was held for the office of *Pradhan* of the Simbhawali Panchayat. A complaint was made by one of the defeated candidates to the Director of Panchayat Raj

* C.A. No. 1988 of 1966.

that the appellant and other officers had tampered with the seal of the ballot box and had cancelled certain ballot papers. An inquiry was instituted against the appellant by the Director of Panchayat Raj. On 24th February 1961, the District Panchayat Raj Officer Meerut, reverted the appellant to the post of Panchayat Secretary and directed that the name of the appellant 'be struck off from the list of Panchayat Secretaries maintained for appointment of officiating Panchayat Inspectors. Before this order was made no opportunity was given to the appellant to explain his conduct.

3 The appellant moved a petition in the High Court of Allahabad on 9th March, 1961, for a writ quashing the orders dated 20th August, 1960 and 24th February, 1961. He claimed that he could not be reduced in rank without giving him an opportunity of showing cause since the reduction in rank of the appellant amounted to imposing a penalty and entailed evil consequences that the appellant was not reverted under the order of a competent officer, that the order violated the service rules and the guarantee of Article 311 under the Constitution of India, that the order was made because of enmity between the family of the appellant and the relatives of the Director of Panchayat Raj and that the appellant had reason to believe that on account of "strained relations" the Director of Panchayat Raj passed an order without giving him even an opportunity of being heard.

4 The petition was dismissed *in limine* by order of Dwivedi, J. The learned Judge held that there was no evidence on the record to show that the appellant was permanently appointed to the post of Panchayat Inspector by order dated 22nd June, 1960, and that in reverting the appellant to the post of Panchayat Secretary by order dated 20th August, 1960, without an enquiry the guarantee under Article 311 of the Constitution was not violated, and that since the appellant was appointed by order dated 13th December, 1960, to officiate as Panchayat Inspector the order was not in contravention of Article 311 (2) of the Constitution. The learned Judge did not consider whether the order was made maliciously or on collateral considerations.

5 Against that order the appellant preferred a special appeal to a Division Bench of the High Court. By order of the High Court the record of the Director of Panchayat Raj and the letter addressed by him to the District Magistrate, Meerut, were called for and admitted in evidence. The letter was issued under the signature of Bhagwant Singh, Director, Panchayat Raj, U P, intimating the District Magistrate that the appellant be reverted to his original post of Panchayat Secretary and his name be struck off from the list of those Panchayat Secretaries maintained for the appointments of officiating Panchayat Inspectors. For this no further communication is necessary. The appellant relied upon this letter and contended in support of his plea that the order was made because of enmity and ill-will against him.

6 The High Court observed that there was controversy whether by the order dated 22nd June, 1960, the appellant was appointed in a permanent capacity as Panchayat Inspector, that the burden of proving that the appellant had been appointed in a permanent capacity lay upon him and in view of the controversy between the parties it could not "be held that he occupied the post in a permanent capacity", that since by the order dated 24th February, 1961 (*sic*), the appellant was appointed only "officiating Inspector" the appellant was not occupying the post of Panchayat Inspector in a "permanent capacity", and in the absence of any material on the record a finding on the point whether "the appellant was holding a substantive post of Panchayat Inspector could not be recorded with any amount of certainty", and "the Court must proceed on the assumption that the appellant was only officiating as a Panchayat Inspector". After referring to the counter-affidavit filed on behalf of the State (presumably in the appeal) the Court observed that the "appellant had been given an officiating chance in a local arrangement and the reversion took place because the person holding the post of Panchayat Inspector in a substantive capacity had joined", that in the petition and the affidavit filed in support of it the circumstances in which the appellant was reverted were not explained and therefore "even though there was no material to show that the

appellant was reverted actually on the ground that the person for whom he was officiating had joined, the possibility that he was reverted on that ground had not been excluded by the averments made in the petition and the affidavit filed in support of it". In the view of the High Court the appellant could not rely upon the letter of the Director of Panchayat Raj, for, it "was brought on record at the appellate stage" and not at the trial before the Single Judge and no explanation was furnished by counsel for the appellant why the letter was not called for or produced earlier. The letter contained a direction to the effect that the name of the appellant be removed from the list of persons eligible for promotion to the post of Panchayat Inspector, but that, in the view of the High Court, by itself did not support the appellant's submission that the appellant was entitled to the protection of Article 311 (2) of the Constitution of India, for, it was not proved that the appellant was legally entitled to have his name recorded in the list of persons eligible for promotion to the post of Panchayat Inspector. The appellant has appealed to this Court with Special Leave.

7. The judgment of the High Court prompts three comments: (1) the appellant claimed that he was by order dated 22nd June, 1960, appointed substantively to the post of Panchayat Inspector and thereafter he was unlawfully reverted. Without investigating this grievance the High Court rejected the petition observing that on that plea disputed questions of fact fell to be determined. If disputed questions of fact arise in a writ petition, and the High Court is of the view that those may not appropriately be tried in a petition for a high prerogative writ, the High Court has jurisdiction to refuse to try those questions and to relegate the party applying to his normal remedy to obtain redress in a suit. The order of the High Court rejecting the petition on the ground that disputed questions of fact fell to be determined is plainly illegal; (2) that if by the first order dated 22nd June, 1960, the appellant was appointed substantively as Panchayat Inspector, a subsequent order cancelling that order and reverting the appellant without enquiry was illegal. If by the order dated 22nd June, 1960, the appellant was

promoted substantively the impugned order dated 24th February, 1961, was liable to be struck down as violative of the guarantee of Article 311 of the Constitution. The High Court did not reach any conclusion on that question. The order dated 13th December, 1960, posting the appellant as an officiating Inspector could not deprive the appellant of the protection of the guarantee under Article 311 (2); and (3) that the appellant pleaded in paragraphs 23 and 24 of his petition and in paragraphs 24, 25 and 26 of the affidavit in support of the petition, that in making the order the Director of Panchayat Raj was actuated by ill-will and malice. The Single Judge summarily rejected the petition without considering these averments. The High Court also did not consider the plea that the Director of Panchayat Raj had acted maliciously.

8. The letter by which the appellant was reverted to the post of Panchayat Secretary, and his name was also ordered to be struck off the list of those Panchayat Secretaries maintained for promotion to the post of Panchayat Inspector, had a two-fold significance, (i) it rendered some support to the plea of *mala fides*; and (ii) it lent support to the claim of the appellant that the order involved evil consequences. The High Court apparently allowed the letter to be brought on the record, but thereafter declined to consider whether it prejudicially affected the appellant. The direction that the appellant's name be struck off the list of Panchayat Secretaries eligible for promotion to the post of Panchayat Inspector involved very serious consequences to the appellant. Before such an order could be made it was obligatory upon the appropriate authority to give an opportunity to the appellant to explain his conduct which merited that punishment. Admittedly no such opportunity was given to the appellant. The order *prima facie* supported both the branches of the argument raised on behalf of the appellant that it involved penal consequences and also that the order was made not due to the exigencies of the service, but to punish the appellant because the relation between the appellant and the Director of Panchayat Raj were strained. Refusal by the High Court to consider the letter after admit-

ting it on the record is open to serious objection. The High Court has refused on grounds which were not relevant to consider an important piece of evidence in support of the case of the appellant, and has thereby denied the appellant a fair trial. The order of the High Court suffers from serious infirmities.

9 We set aside the order of the High Court and of the Trial Judge and direct that the Trial Judge do issue notice to the respondents in the petition filed by the appellant and do proceed to hear and decide the petition filed by the appellant.

10 It may be observed that according to the decisions of this Court the mere form of the order reverting an officer to his substantive post even if he is appointed temporarily or in an officiating capacity to a superior post, is not decisive. If the order is made for a collateral purpose, or if in making the order the officer is actuated by malice, the order is liable to be set aside. Again if the order involves a penalty, even if on the face of it the order does not bear any such impress, the Officer prejudiced by the making of that order is entitled to prove that he has been denied the protection of the guarantee under Article 311 of the Constitution, or of the protection of the rules governing his appointment. An order of reversion made due to exigencies of the service in consequence of which an officer who was temporarily appointed or appointed in an officiating vacancy may not be challenged. But the order passed maliciously or on collateral considerations or which involves penal consequences, or denied to the civil servant the guarantee of the Constitution or of the rules governing his employment, is always open to challenge by appropriate proceedings.

11 The appellant will be entitled to his costs in this Court and in the High Court. Costs before the single Judge will be costs in the petition.

V M K

— Orders set aside,
matter remitted
to the trial Judge,
directions given

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — *M Hidayatullah, C J and A N Ray, J***Channabasappa Basappa Happa**
*Appellant****The State of Mysore***Respondent*

Departmental enquiry—Police officer remaining absent without leave and resorting to fast as a demonstration against the action of the superior officer—Appellant admitting the facts—Discipline, if established

If a police officer remains absent without leave and also resorts to fast as a demonstration against the action of the superior officer, the indiscipline is fully established. In the departmental enquiry, the appellant, a police constable, admitted the facts necessary to establish the charge against him. He did not wish to cross examine any witness or lead evidence on his own behalf. He only stated that his acts should be adjudged on the basis of the documents which were in the case. This was done and there cannot be a complaint that the departmental enquiry was either one-sided or not fair. He was properly adjudged guilty of indiscipline and the order of dismissal which was passed against him was merited.

[*Paras 5 and 7*]

Appeal by Special Leave from the Judgment and Order dated the 25th February, 1966 of the Mysore High Court in Regular Second Appeal No. 84 of 1962.

S S Jasali and A G Ratnaparkhi,
Advocates, for Appellant

Mrs Shyamala Pappu and S P Nayar,
Advocates, for Respondent

The Judgment of the Court was delivered by

Hidayatullah, C J—The appellant files his appeal by Special Leave against the judgment of the learned Single Judge of the Mysore High Court, 25th February, 1966, by which the appeal of the State

Government in a civil matter was allowed and the order of dismissal of the appellant who is a former police constable was confirmed. His cross-objection was dismissed.

2. The appellant was a police constable serving in the Dharwar District. He joined the police force on 1st August, 1945, in the former State of Bombay. On the States Reorganisation, he came under the jurisdiction of the State of Mysore and it was on 26th November, 1953, that he was dismissed after a departmental enquiry against him on the following facts. The petitioner had proceeded on leave for a month from 1st January, 1953. On 26th January, 1953, he applied for extension of leave for a month. A reply was received by him refusing leave, but only on 21st February, 1953. He made a second application for extension of leave on the same date, but this extension of leave was not granted. On 26th February, 1953, he undertook a 7 days' fast at a temple situated three miles from Dharwar and wrote letters to his superior officers to which we shall refer presently. A charge was framed against him under three heads which were that he was guilty of serious misconduct and disciplinary action in that he remained absent from duty without leave or permission from (31st?) January, 1953, that he had sent letters to his superior officers intimating his intention to go on fast with effect from 26th February, 1953, "for the upliftment of the country etc." and that he had sent copies of these letters to several newspapers also. The third charge was that he did go on fast on 26th February, 1953 and continued it till 5th March, 1953, at the temple contrary to the discipline of the police force. He was duly served with these charges and was also asked to obtain such copies from the record as he needed for his defence and to bring a friend to defend him if he liked. When the enquiry commenced, he was put a few questions by the enquiring officer which may be referred to in detail.

Q. (1) Have you received a copy of the charge-sheet?

A. Yes.

Q. (2) Have you understood the charges?

A. Yes.

Q. (3) Do you accept the charges framed against you?

A. Yes.

Q. (4) Have you anything to say for breaking the discipline of the Police Force?

A. "I had been on leave for one month. I applied to the Sub-Inspector for the extension of my leave by another month. I thought that my leave may be extended. Hence I did not join duty on 31st January, 1953. I was greatly worried by the injustice done by the police to the poor public and with a view to improve the Police Force and after informing the concerned authorities, I went on fast. I do not want any help from anybody for defending myself. I do not propose to cross-examine any witness that may be examined. Nor do I propose to examine any witness on my side. I do not know the Police Manual Rules. I submitted the petition in the interests of the general public. I did not go on fast in my self-interest. I have done so in public interest. We are living in a democratic country. So whatever is in the interests of the general public cannot run counter to the discipline of the Police Force. I pray for proper justice on the basis of my reply and the documents which are against me. I do not desire to say anything more."

3. It will appear from this that he did not want to take any more part in the enquiry than to have the matter adjudged on the basis of his reply and the documents which were against him. This is what he had stated in the penultimate sentence of his own statement and in the earlier part, he had unequivocally admitted the facts which had been placed in charge against him. His explanation was two-fold, namely that he continued to absent himself because he thought that leave might have been extended and secondly that his proceeding to go on fast was in the interest of democracy and the country as a whole and also to improve the police force.

4. The pleas of the petitioner are quite clear; in fact he admitted all the relevant facts on which the decision could be given

against him and therefore it cannot be stated that the enquiry was in breach of any principle of natural justice. At an enquiry facts have to be proved and the person proceeded against must have an opportunity to cross-examine witnesses and to give his own version or explanation about the evidence on which he is charged and to lead his defence. In this case, the facts were two-fold, that he had stayed beyond the sanctioned leave and that he had proceeded on a fast as a demonstration against the action of the authorities and also for what he called the upliftment of the country etc. These facts were undoubtedly admitted by him. His explanation was also there and it had to be taken into account. That explanation is obviously futile, because persons in the police force must be clear about extension of leave before they absent themselves from duty. Indeed this is true of every one of the services, unless of course there are circumstances in which a person is unable to rejoin service, as for example when he is desperately ill or is otherwise reasonably prevented from attending to his duties. This is not the case here. The petitioner took upon himself the decision as to whether leave could be extended or not and acted upon it. He did go on a fast. His later explanation was that he went on a fast for quite a different reason. The enquiry officer had to go by the reasons given before him. On the whole therefore the admission was one of guilty in so far as the facts on which the enquiry was held and the learned Single Judge in the High Court was, in our opinion, right in so holding.

5 It was contended on the basis of the ruling reported in *Ragna v Durham Quarter Sessions Ex parte Virgo*¹, that on the facts admitted in the present case, a plea of guilty ought not to be entered upon the record and a plea of not guilty entered instead. Under the English law, a plea of guilty has to be unequivocal and the Court must ask the person and if the plea of guilty is qualified the Court must not enter a plea of guilty but one of not guilty. The police constable here was not on his trial for a criminal offence. It was a departmental enquiry, on facts of which due notice was given to him. He admitted the

facts. In fact his Counsel argued before us that he admitted the facts but not his guilt. We do not see any distinction between admission of facts and admission of guilt. When he admitted the facts, he was guilty. The facts speak for themselves. It was a clear case of indiscipline and nothing less. If a police officer remains absent without leave and also resorts to fast as a demonstration against the action of the superior officer the indiscipline is fully established. The learned Single Judge in the High Court was right when he laid down that the plea amounted to a plea of guilty on the facts on which the petitioner was charged and we are in full agreement with the observations of the learned Single Judge.

6 The case really is not one of any merit, the plea raised before us was in *ad misericordiam*. We were asked to take the view that this man was actuated by his own feeling that leave would be extended and further that his going on fast was not for the purpose of the admission but for some other purpose. Even if we were to take the admission as a whole with all its qualifications, we are quite clear that he admitted the facts necessary to establish the charge against him.

7 The learned Counsel for the appellant further relied upon a ruling of this Court in *Jagdish Prasad Saxena v The State of Madhya Bharat (now Madhya Pradesh)*¹. That case is absolutely distinguishable. There are of course certain general observations about the importance of departmental enquiry and how it should be conducted. We have here a clear case of a person who admitted the facts and did not wish to cross-examine any witness or lead evidence on his own behalf. He only stated that his acts should be adjudged on the basis of the documents which were in the case. This was done and there cannot be a complaint that the departmental enquiry was either one-sided or not fair. On the whole therefore we are satisfied that the appellant was properly adjudged guilty of indiscipline in the departmental enquiry and the order of dismissal which was passed against him was merited. In view of the facts that we are satisfied that the appellant is one of those persons who

thinks that other people in the world have to be corrected and that perhaps he is one who is impelled by his own thoughts, we think that the ends of justice would be served by not awarding costs against him. With these observations, we dismiss the appeal.

V.M K. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.
(Civil Appellate Jurisdiction.)

PRESENT.—J. C. Shah, K. S. Hedge and A. N. Grover, JJ.

Additional Collector of Customs, Calcutta and another *Appellants**

v.

M/s. Best & Co.

Respondent.

Imports and Exports (Control) Act, (XVIII of 1947) (as amended in 1960) and Sea Customs Act (VIII of 1878), section 167 (8)—Breach of conditions of licence—Whether liable to be punished under section 5 as amended—Confiscation of goods—Whether can be ordered.

Contravention of any condition of a licence granted under any order is liable to be punished under section 5 as amended. But on the terms of section 5 as amended the right to impose penalty for contravention of any condition of a licence may be exercised under the Sea Customs Act, 1878, and not under the Imports and Exports (Control) Act, 1947. For breach of any condition of a licence, it is open to the authorities to direct prosecution, but no order confiscating goods and imposing penalty in lieu thereof can be made. The order of confiscation can only be made under section 167, clause 8 of the Sea Customs Act. The said clause 8 provides for confiscation of the goods the importation or exportation of which is prohibited by Chap. IV of the Sea Customs Act, 1878. Then otification of which the contravention is alleged is not under section 19 of the Sea Customs Act but under the Imports Exports (Control) Act, 1947. The scope of power under the Sea Customs is not enlarged by the amendment to section 5 of the Imports and Exports (Control) Act and the provisions of the Sea Customs Act, 1878, cannot be invoked to punish the breach of a condition of licence granted under the Imports and Exports (Control) Act, 1947. [Paras. 9, 10 and 11.]

*C.A. No. 2003 of 1966.

23rd October, 1970.

Appeal from the Judgment and Order dated the 18th December, 1964 of the Calcutta High Court in Appeal No. 254 of 1963.

Ram Panjvani and S. P. Nayar, Advocates, for Appellants.

The Judgment of the Court was delivered by

Shah, J.—On 31st March, 1959, the Ministry of Commerce and Industry, Government of India, granted to the respondents a licence permitting them to import from West Germany certain machinery described therein of the maximum C.I.F. value of Rs. 45,000. Condition No. 1 of the licence provided that:

“The * * * application is accepted and import licence is hereby granted having quantity and value as the limiting factors and is not valid for clearance if the actual value of any item exceeds the C.I.F. value indicated in the licence by more than 5 per cent.”

The respondents submitted a bill of entry dated 1st July, 1960, disclosing the C. I. F., value of the consignment as Rs. 45,179-92 inclusive of landing charges, and cleared the consignment after paying duty assessed by the Customs authorities on the real value of the goods as disclosed in the bill of entry.

2. On 20th June, 1961, the Customs authorities issued a notice requiring the respondents to show cause why penal action should not be taken against them under section 167 (8) of the Sea Customs Act, 1878, as being persons concerned in the unauthorised importation of the goods. This notice was amended by notice dated 21st September, 1961, whereby the respondents were charged with having committed offences under section 167 (8) read with section 3 (2) of the Imports and Exports (Control) Act, 1947, for illegally importing the machinery. The respondents claimed that no breach of the conditions of the licence was committed. The Additional Collector of Customs, Calcutta, by order, dated 17th March, 1962, directed confiscation of the machinery under section 167 (8) of the Sea Customs Act read with section 3 (2) of the Imports and Exports (Control) Act, 1947, and permitted the respondents to pay a fine of Rs. 20,000 in lieu of confiscation. A personal penalty of Rs. 25,000 was also imposed on the respondents.

3 The respondents then moved a petition before the High Court of Calcutta under Article 226 of the Constitution praying for a writ quashing the adjudication order dated 17th March, 1962. A Single Judge of the Calcutta High Court dismissed the petition, but in appeal under the Letters Patent the High Court reversed the decision and issued a writ of *certiorari* quashing the order dated 17th March, 1962. The Additional Collector of Customs, Calcutta, has appealed to this Court with certificate granted by the High Court.

4 The only question which falls to be determined is whether for breach of a condition of the licence penalty may be imposed under section 5 of the Imports and Exports (Control) Act, 1947, read with the Sea Customs Act, 1878.

5 The relevant statutory provisions may first be noticed. Under section 167 of the Sea Customs Act, 1878, the offences mentioned in the first column of the Schedule are punishable to the extent mentioned in the third column of the same with reference to such offences respectively—

Offences	Section of this Act to which offence has reference	Penalties
8 If any goods the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act be imported into or exported from India contrary to such prohibition or restriction or	18 & 19	Such goods shall be liable to be confiscated and any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods or not exceeding one thousand rupees

Chapter IV of the Sea Customs Act, 1878, contains three sections, sections 18, 19 and 19-A. By section 18 an absolute prohibition is imposed in respect of importation of goods by land or by sea specified therein. Section 19 provides that the Central Government may from time to time, by notification in the Official Gazette prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of India across any customs frontier as defined by the Central Government.

6 The Central Legislature enacted the Imports and Exports (Control) Act, 1947, with the object of authorising prohibition and control on imports and exports. By section 3 of that Act it was provided

"(1) The Central Government may, by order published in the Official Gazette, make provisions for prohibiting, restricting or otherwise controlling in all cases or in specified classes of cases, and subject to such exceptions if any, as may be made by or under the order—

(a) the import, export, carriage coastwise or shipment as ships stores of goods of any specified description,

(b) the bringing into any port or place in India or goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried.

(2) All goods to which any order under sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited under section 19 of the Sea Customs Act, 1878, and all the provisions of that Act shall have effect accordingly, except that section 183 thereof shall have effect as if for the word "shall" therein the word "may" were substituted.

(3) * * * *

7 Section 5 of the Imports and Exports (Control) Act, 1947, as originally enacted, provided

"If any person contravenes any order made or deemed to have been made under this Act, he shall, without prejudice to any confiscation or penalty to which he may be liable under the provisions of the Sea Customs Act, 1878, as applied by sub-section (2) of section 3, be punishable with imprisonment for a term which may extend to one year, or with fine, or with both."

8. In exercise of the power conferred by sections 3 and 4-A of the Imports and Exports (Control) Act, 1947, the Central Government issued the Imports (Control) Order, 1955. Clause 3 of the Imports (Control) Order prevented importation of any goods of the description specified in Schedule I except under, and in accordance with, a licence or a customs clearance permit granted by the Central Government or by any officer specified in Schedule II. By sub-clause (2) of clause 3 it was provided that if in any case, it was found that the goods imported under a licence did not conform to the description given in the licence or were shipped prior to the date, of issue of the licence under which they were claimed to have been imported, then, without prejudice to any action that may be taken against the licensee under the Sea Customs Act, 1878, in respect of the said importation the licence may be treated as having been utilised for importing the said goods. By clause 5 certain conditions could be imposed by the Licensing Authority issuing a licence.

9. It may be recalled that one of the conditions of the licence issued to the respondents was that the value of any item shall not exceed the C.I.F. value indicated in the licence by more than 5 per cent. It was the case of the Customs authorities that the real value of the machinery imported exceeded the declared value, and on that account the respondents had infringed the conditions of the licence. In *East India Commercial Company Ltd., Calcutta and another v. The Collector of Customs, Calcutta*¹, this Court held that section 167, clause 8 of the Sea Customs Act, 1878, read with section 3 (2) of the Imports and Exports (Control) Act, 1947, authorised the imposition of penalty, if goods were imported in contravention of any order under the Imports and Exports (Control) Act, 1947, but the section did not, expressly or by implication, authorise confiscation of goods imported under a valid licence on the ground that a condition of the licence not imposed by the order was infringed. This view was reiterated by this Court in *Boothalinga*

*Agencies v. T. C. Poriaswami Nadar*¹. These cases were decided on the interpretation of section 5 of the Imports and Exports (Control) Act, 1947, as it stood before it was amended by Act IV of 1960. By the Imports and Exports (Control) Amendment Act IV of 1960, in section 5, after the words "any order made or deemed to have been made under this Act," the words "or any condition of a licence granted under any such order" were inserted. Contravention of any condition of a licence granted under any order was therefore liable to be punished under section 5 as amended.

10. In the present case the Customs authorities did not direct prosecution for contravention of any condition of a licence: they directed confiscation of the machinery and imposed penalty in lieu thereof. But on the terms of section 5 as amended, the right to impose penalty for contravention of any condition of a licence may be exercised under the Sea Customs Act, 1878 and not under the Imports and Exports (Control) Act, 1947. For breach of any condition of a licence, it is open to the authorities to direct prosecution, but no order confiscating goods and imposing penalty in lieu thereof could be made. The order of confiscation could only be made under section 167, clause 8 of the Sea Customs Act, 1878: in terms, clause 8 of section 167 provides for confiscation of the goods importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of the Sea Customs Act, 1878. The notification of which the contravention is said to have been made, is not issued under section 19 of the Sea Customs Act, but under the Imports and Exports (Control) Act, 1947. It has not been urged before us, and rightly, that penalty or confiscation is incurred under the provisions of the Sea Customs Act, 1878, for breach of the conditions of the licence.

11. In our judgment, the High Court was right in holding that the scope of power under the Sea Customs Act was not enlarged by the amendment to section 5 of the Imports and Exports (Control) Act, and there is nothing in the amended

1. (1969) 1 S.C.R. 65 : (1969) 2 S.C.J. 31 : (1969) 2 M.L.J. (S.C.) 15 : (1969) 2 An.W.R. (S.C.) 15 : A.I.R. 1969 S.C. 110.

section 5 of the Imports and Exports (Control) Act which warrants the view that the provisions of the Sea Customs Act, 1878, may be invoked to punish the breach of a condition of a licence granted under the Imports and Exports (Control) Act, 1947

12 The appeal fails and is dismissed. There will be no order as to costs

S V J ————— *Appeal allowed*

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — *J C Shah, A S Hegde and A N Grover JJ*

The Megna Mills Co., Ltd *Appellant**

v

Ashoka Marketing Ltd *Respondent*

Forward Contracts (Regulation) Act (LXIV of 1952) sections 11 and 15—East India and Hessian Exchange Ltd—Bye laws 1 (b), 15 and 17—Bye law (i) (b) whether mandatory—Effect of non-compliance

Bye law 1 (b) of Chapter V is mandatory when read with bye laws 15 and 17. Condition 2 cannot be regarded as consequential because it must be stipulated how many working days notice has to be given by the buyers to place goods alongside "export vessel in the Port of Calcutta". Literal compliance with the prescribed Form may not be essential but if the contract does not contain all the terms and conditions set out in the form the contract will be void under the provisions [Paras 7 and 8]

Appeal by Special Leave from the Judgments and Orders dated the 4th April, 1966 of the Calcutta High Court in Mattes Nos 26 and 27 of 1966

A A Sen Senior Advocate (*O P Khaitan* and *D N Gupta* Advocates, with him), for Appellant (In C.A. No. 2012 of 1966)

O P Khaitan and *D N Gupta*, Advocates, for Appellant (In C.A. No. 2013 of 1966)

S T Desai Senior Advocate (*H K Puri* and *K K Jain* Advocates, with him), for Respondent (In C.A. No. 2012 of 1966)

H K Puri and *K K Jain*, Advocates for Respondent (In C.A. No. 2013 of 1966)

The Judgment of the Court was delivered by

Grover, J—These two appeals by Special Leave are from a judgment of the Calcutta High Court holding that the disputes between the parties could not be referred to arbitration

2 It is necessary to state the facts only in Civil Appeal No. 2012 of 1966. The appellant was and still is a member of the East India Jute and Hessian Exchange Limited, hereinafter called the "Exchange", which is the only association recognised under the provisions of the Forward Contracts (Regulation) Act, 1952, hereinafter called the "Act". The respondent is not a member of the said association. On 21st December, 1962, a transaction was entered into between the parties by means of a letter written by the respondent to the appellant. This letter was in the following terms:

"We have today bought from you the following goods:

Description Jute carpet backing cloth bound on cardboard cores 152" wide

Weight 9 oz 'on 36"

Warp Ends Per Inch 15

Weft Ends Per Inch 13

Oil contents Upto 2 per cent

Quantity 5,000 rolls each roll having continuous length of 300 yards approximately

Rate Rs. 4,000 per ton

Delivery 500 rolls monthly, March, 1963 to December, 1963

All other terms and conditions of the East India and Hessian Exchange standard contract will be applicable to this contract. Please sign your acceptance on the duplicate copy of this letter."

3 The appellant from time to time delivered certain rolls of jute carpet backing cloth under the aforesaid contract, the price of which was paid by the respondent. As regards the balance number of rolls deliverable under the contract the appellant purchased back and the respondent resold the balance quantities of goods by a contract dated

9th December, 1963, which transaction was embodied in a letter of the appellant to the respondent dated 9th December, 1963, and which was countersigned by the respondent. According to the appellant it was agreed or understood between the parties that deliveries under the two contracts of 21st December, 1962 and 9th December, 1963, would be set-off against each other. As regards 1,000 rolls deliverable for the months of August and September, 1963, under the contract dated 21st December, 1962, the appellant is stated to have received from the respondent difference in the price of goods but in respect of the balance of 1500 rolls the respondent did not pay the difference. The appellant demanded the difference payable by the respondent under the said contracts. Disputes and differences having arisen between the parties in the matter the appellant referred its claim to the arbitration of Bengal Chamber of Commerce and Industry. This was purported to have been done on the footing that the contracts provided that all terms and conditions thereof would be governed by the bye-laws of the Exchange for trading in transferable specific delivery contracts. The standard contract forms and the rules and bye-laws of the Exchange, *inter alia*, provided for arbitration of the Bengal Chamber of Commerce and Industry. When the Chamber proceeded with the arbitration pursuant to the reference the respondent filed a petition before the Calcutta High Court on 19th February, 1966, under section 33 of the Indian Arbitration Act, 1940. It was prayed that the extent and validity of the arbitration agreement contained in the contracts be determined and it be declared that there was no valid arbitration agreement between the parties in respect of the contracts dated 21st December, 1962 and 9th December, 1963. The main point raised in the respondent's petition was that the contracts were not in accordance with the provisions of the Act or the bye-laws of the Exchange and were not in the forms prescribed and were, therefore, void and illegal. This petition was heard by A.N. Sen, J., who allowed the petition and held that the contracts were illegal and there was no valid arbitration agreement between the parties.

4. The Act provides for regulation of certain matters relating to forward con-

tracts, the prohibition of options in goods and for matters connected therewith including the setting up of a Forward Markets Commission, recognition of association for the purpose of the Act; for issuing notifications for regulating or prohibiting forward contracts and option in goods etc. Section 11 empowers a recognised association to make bye-laws for the regulation and control of forward contracts subject to previous approval of the Central Government. Sub-section (3) of section 11 is as follows :—

(3) "The bye-laws under this section may—

(a) specify the bye-laws the contravention of any of which shall make a contract entered into otherwise than in accordance with the bye-laws void under sub-section (2) of section 15;

(aa) specify the bye-laws the contravention of any of which shall make a forward contract entered into otherwise than in accordance with the bye-laws illegal under sub-section (3-A) of section 15.

(b)

under section 15 (1) the Central Government may by notification declare the circumstances in which the forward contracts in notified goods would be void and illegal. Sub-section (2) of section 15 provides that any forward contract in goods entered into in pursuance of sub-section (1) which is in contravention of any of the bye-laws specified in this behalf under clause (a) of sub-section (3) of section 11 shall be void. Sub-section (3-A) makes any forward contract in goods entered into in pursuance of sub-section (1) which at the date of the contract is in contravention of any of the bye-laws specified in this behalf under clause (aa) of sub-section (3) of section 11 illegal.

5. By means of a notification dated 29th March, 1958, the Central Government declared as follows:—

"In exercise of the powers conferred by sub-section (1) of section 15 of the Forward Contracts (Regulation) Act, 1952 (LXXIV of 1952), the Central Government hereby declares that the said section shall apply to jute goods (hessian cloth made of jute or bags of

such hessian cloth and sacking cloth) in the City of Calcutta”

Pursuant to the provisions of section 11 of the Act the Exchange made bye-laws for trading in transferable specific delivery contracts in jute goods. These bye-laws and the form of the contract prescribed are contained in Working Manual Volume III. Chapter V of the Bye laws contains the general trading provisions. According to bye law (1) (b) all transferable specific delivery contracts shall be in writing in the prescribed forms (Appendix II for jute goods and Appendix IV for raw jute). Clause (g) of the aforesaid bye law (1) laid down that all transferable specific delivery contracts shall be subject to the provisions of the Bye laws. Bye-laws 15 and 17 may be reproduced

15 “No member shall enter into a transferable specific delivery contract in raw jute and/or jute goods otherwise than on the terms and conditions prescribed under these bye-laws

17 Any transferable specific delivery contract entered into in raw jute and/or jute goods which at the date of the contract is in contravention of the provisions of any of the bye laws 1 (c), 13, 14, 15 and 16 of Chapter V shall be illegal under the provisions of section 15 (3-A) of the Forward Contracts (Regulation) Act, 1952”

6 The main controversy has entered on the question whether the contracts out of which the disputes arose were in the form set out in Appendix II in the Working Manual. It was maintained by the appellant that although the contracts out of which the disputes arose did not strictly conform to the prescribed Form but they were substantially in the same terms as were contained in the Form. As only substantial compliance was necessary the appellant could not be denied the benefit of bye laws contained in Chapter X of the Working Manual relating to arbitration. Bye law 1 of that Chapter provides that arbitration of any claims and disputes whether admitted or not arising out of or in relation to all transferable specific delivery contracts in raw jute and/or jute goods between members or between members and non members under the provisions of the bye laws shall be referred to the Tribunal of Arbitration either

of the Bengal Chamber of Commerce and Industry or the Indian Chamber of Commerce, Calcutta, as is agreed in the contract in accordance with the rules framed by the said Chamber for the purpose of arbitration by its tribunal from time to time provided where in a transferable specific delivery contract the name of the Tribunal of Arbitration of either of the aforesaid two Chambers is omitted, such reference shall be made to the Tribunal of Arbitration of the Bengal Chamber of Commerce and Industry. The case of the respondent, however, was that the contracts were not in the Form contained in Appendix II in the Working Manual which was the prescribed Form under the bye laws and therefore the bye laws, including the one relating to arbitration in Chapter X could not be made applicable for the purpose of referring the disputes to the Tribunal of Arbitration which, in the present case, was the Bengal Chamber of Commerce and Industry, Calcutta. The High Court came to the conclusion that the contracts in question violated bye laws 1 (b) and 15 in Chapter V of the Working Manual. The contravention of these bye laws rendered the contracts illegal under the provisions of bye law 17 of the same Chapter. The learned Judge noticed in particular the absence of any term in the contracts similar to clause (2) in the prescribed Form in Appendix II which is as follows

“Buyers to give clear working days notice to place goods alongside”

Now in the contracts no such term appeared that the buyers would give clear notice to place goods alongside, of the number of working days specified. It has been contended before us on behalf of the appellant that the mere absence of this condition or term in the contracts was not sufficient to take them outside the prescribed form which had only to be substantially complied with and it was not necessary that blanks in each and every condition in the Form should have been filled up. It has further been urged that bye-law 1 (b) of Chapter V could not be regarded as mandatory requiring the details in the Form in Appendix II to be completed in all cases. Even with reference to condition (2) in the prescribed Form it has been submitted that if the number of days was not specified a reason-

able time should have been read into that condition. In other words, the buyers were to give notice to place goods alongside within a reasonable time.

7. In our opinion, the High Court was right in holding that the contracts in question were not in the prescribed Form and thus they did not comply with the requirement of bye-law 1 (b) of Chapter V. There can be no manner of doubt that that bye-law is mandatory when read with bye-laws 15 and 17. It must be remembered that under bye-law 15 no member shall enter into any transferable specific delivery contract otherwise than on terms and conditions prescribed under the bye-laws and under bye-law 17 if there is a contravention, *inter alia*, of bye-law 15 the contract shall be rendered illegal by virtue of the provisions contained in section 15 (3-A) of the Act. Section 11 (3) (aa) specifically empowers the Exchange to make bye-laws the contravention of any of which shall make a forward contract entered into otherwise than in accordance with such bye-laws illegal. If, therefore, the contracts in question did not comply with the requirement of bye-law 1 (b) of Chapter V they would be rendered illegal and void.

8. It is true that in the letters evidencing the contracts it was mentioned "all other terms and conditions of the East India and Hessian Exchange standard contract will be applicable", which may be taken to import conditions 1 to 7 given in the penultimate column of the prescribed Form. There would still be non-compliance with condition No. 2 reproduced before. Even if it was not necessary to use the same language the number of clear working days had to be specified which was not done in the contracts in dispute. Condition No. 2 cannot be regarded as inconsequential because it must be stipulated how many working days notice has to be given by the buyers to place goods alongside "export vessel in the Port of Calcutta". Literal compliance with the prescribed Form may not be essential but if the contract does not contain all the terms and conditions set out in the Form the contract will be void under the provisions set out before; (See the ratio of the decision in *Radhakisson Gopikisson v. Balmukund Ramchandra*).

9. For the reasons given above the appeals must fail and they are dismissed with costs. One hearing fee.

S.V.J. — Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT.—*J. C. Shah, K. S. Hegde and A. N. Grover, JJ.*

Sunil Kumar Roy *Appellant**

v.

M/s. Bhowra Kankanee Collieries Ltd. and others *Respondents.*

Indian Registration Act (XVI of 1908), section 17—Registered lease deed—Agreement to vary rent—Registration, whether, essential.

It is well settled that a document which varies the essential terms of the existing registered lease, such as the amount of rent, must be registered. The consistent view that has been taken is that registration of an agreement is necessary which reduces the rent of an existing registered lease. [Para. 3.]

Appeal from the Judgment and Decree-dated the 9th October, 1964 of the Patna High Court in Appeal from Original Decree No. 459 of 1959.

B. Sen, Senior Advocate (*Sukumar Ghose*, Advocate, with him), for Appellant.

M. C. Chagla, Senior Advocate (*S. G. Banerjee* and *A. K. Nag*, Advocates, with him), for Respondents Nos. 1 and 2.

The Judgment of the Court was delivered by

Grover, J.—This is an appeal by certificate from a judgment of the Patna High Court. The facts may be shortly stated. By a registered indenture of lease dated 18th December, 1900, the Eastern Coal Co. Ltd. was granted a lease by the Zamindar of Jharia of certain land in mauza Gourkhanti in Pargana Jharia. The Eastern Coal Co. erected buildings for manufacture of coke and also constructed office and the quarters for the staff and the labourers. On 17th May, 1946, the Eastern Coal Co. sold the machineries on

the demised land to the appellant and also granted a lease of the land on which the buildings stood to him. One of the terms of the lease was that royalty would be paid by the appellant at the rate of Re 1 per ton on despatches of coke. The rate was subject to being revised from time to time by mutual arrangement between the parties "as may be justified by market condition". According to the appellant the Eastern Coal Company came to an arrangement in 1950 with him by which royalty on breeze coke was to be paid at the rate of 2 As per ton. In December, 1951, another arrangement was arrived at by which royalty on hard coke was to be paid at the reduced rate of 8 As per ton instead of Re 1 per ton stipulated in the lease dated 17th May, 1946. This arrangement was to be given effect to from 19th July, 1952. On 5th January, 1955, the Eastern Coal Company informed the appellant that the colliery had been sold to the Bhowra Kankanee Collieries Ltd. respondent No 1, the sale being effective from 1st January, 1955. Respondent No 1 claimed royalty on all despatches of coke including breeze coke at the rate of Re 1 per ton. The appellant took up the position that by mutual agreement Eastern Coal Company had agreed to the royalty being payable on hard coke at the rate of 8 As per ton and on breeze coke at 2 As per ton. The appellant paid to respondent No 1 the amount calculated according to the above rates.

2. On 31st January, 1956, respondent No 1 instituted a suit against the appellant claiming a sum of Rs 23,287 4 3 on account of royalty on all kinds of coke despatched during the period January, 1955, to November, 1955 at the rate of Re 1 per ton. The company further claimed damages at 6% per annum amounting to Rs 1,212-11-9. The appellant contested the suit, his main plea being that by virtue of the arrangement arrived at with the Eastern Coal Company in accordance with the terms of the lease dated 17th May, 1946, the royalty was payable at the rate of Re 1 per ton for hard coke and 2 As per ton for breeze coke. The trial Court accepted the plea of the appellant about reduction of the rates of royalty in terms of the arrangement arrived at with the Eastern Coal Company. It was further

held that the document Exhibit A 4 in which this agreement or arrangement was incorporated did not require registration compulsorily and was admissible in evidence. The suit was dismissed. Respondent No 1 preferred an appeal to the High Court. Although the point with regard to the admissibility of Exhibit A 4 for lack of registration was raised before the High Court it did not give any decision on it. The judgment of the High Court rested on the finding that the appellant had failed to prove that the reduction in the rate of royalty had been given effect to from July, 1952.

3. Mr B Sen for the appellant sought to raise the question about the admissibility of Exhibit A 4 for want of registration. In the first place this contention cannot be entertained so long as the finding of the High Court on the only point which was canvassed before it about the reduction of the rate of royalty is not set aside. The High Court had held after an examination of the evidence that it had not been proved that there was any change in the market condition in July or in December, 1953, to call for a reduction in the rate of royalty or that there was any mutual arrangement or agreement between the lessor or the lessee for such a reduction which was to become effective from July 1952. No attempt was made by Mr Sen to persuade us to reverse this conclusion. Even on the assumption that a mutual arrangement or agreement as evidenced by Exhibit A 4 was arrived at between the appellant and the Eastern Coal Co Ltd., we are unable to agree that any reduction in the rate of royalty could have been effected by means of Exhibit A-4 which had not been registered under the provisions of the Indian Registration Act. It is well settled by now that a document which varies the essential terms of the existing registered lease, such as the amount of rent, must be registered. See *Durga Prasad Singh v. Rajendra Narain Bagchi*¹, which was approved by the Full Bench in *Lalit Mohan Ghosh v. Gopal Chuk Coal Company Ltd*². The decision of the Madras High Court in *Obai Goundan v. Ramalinga Ayyar*³, taking a contrary view

1 - (1910) I.L.R. 37 Cal. 293

2 - (1912) I.L.R. 39 Cal. 284

3 - (1899) I.L.R. 22 Mad. 217 8 M.L.J. 256

has not been followed by the High Courts in India and the consistent view that has been taken is that registration of an agreement is necessary which reduces the rent of an existing registered lease. *See Mulla on Indian Registration Act, 7th Edition* pages 75-76.

4. The other contentions faintly raised before us arising out of issue No. 3 and that Exhibit A-4 had been acted upon do not survive in view of the conclusions arrived at by the High Court and the view that we have taken about the admissibility of the aforesaid document. The Civil Miscellaneous Petitions which were filed in this Court shall stand dismissed as, in our opinion, no ground has been made out for admitting additional evidence or for impleading the Oriental Coal Co., Ltd., as a party respondent here.

5. The appeal fails and it is dismissed with costs.

S.V.J. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—*J. C. Shah, G. K. Mitter, K. S. Hegde, A. N. Grover and A. N. Ray, JJ.*

The State of Bihar and another

... *Appellants**

v.

Tata Engineering and Locomotive Co., Ltd.

... *Respondent.*

Constitution of India (1950), Article 286 (2) (Prior to amendment) and Bihar Sales-tax Act, 1947—Sales in the course of inter-State trade or commerce—When amount to—Ingredients.

Sales will be considered as sales in the course of export or import or sales in the course of inter-State trade and commerce under the following circumstances :

(1) when goods which are in export or import stream are sold ;

(2) when the contract of sale or law under which goods are sold require those goods to be exported or imported to a foreign country or from a foreign country as the case may be or are required to be trans-

ported to a State other than the State in which the delivery of goods takes place ; and

(3) where as a necessary incidence of the contract of sale of goods sold are required to be exported or imported or transported out of the State in which the delivery of goods takes place.

Where under the terms of a contract of sale the buyer is required to remove the goods from the State in which he purchased those goods to another State and when the goods are so removed, the sale in question must be considered as a sale in the course of inter-State trade or commerce. This is a well-established position in law.

[*Paras. 14 and 16*]

On facts held, that the sales in question must be held to be sales in the course of inter-State trade or commerce.

[*Paras. 13 and 17.*]

Coffee Board, Bangalore v. Joint Commercial Tax Officer, Madras. 25 S.T.C. 528 (S.C.), explained.

Appeal by Special Leave from the Judgment and Order, dated the 4th May, 1966 of the Patna High Court in Misc. Judicial Case No. 284 of 1962.

A. K. Sen, Senior Advocate (*U. P. Singh*, Advocate, with him), for Appellants.

N. S. Palkhivala, Senior Advocate (*S. B. Mehta* and *B. Datta*, Advocates, and *M/s. J. B. Dadachanji & Co.*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Hegde, J.—This is an appeal by Special Leave. It arises from the judgment of the High Court of Patna in a Reference under section 25 (3) of the Bihar Sales Tax Act, 1947. That reference was called for by the High Court at the instance of the assessee-company (the respondent herein). The questions referred for the opinion of the High Court by the Board of Revenue were:

“(1) With regard to the sales which took place in the period from 1st of April, 1955 to the 6th September, 1955, whether the assessee is entitled, upon the facts found by the Board of Revenue with regard to these categories of sales, to exemption from liability under the Bihar Sales Tax Act because of the provision of Article 286 (1) (a) of the

Constitution as it stood at the relevant date read with the Explanation to that article

(2) With regard to the sales which took place in the period from 7th September, 1955 to 31st March, 1956, whether the assessee is entitled upon the facts found by the Board of Revenue with regard to these categories of sales, to exemption from liability under the Bihar Sales tax Act on the ground that the sales took place in the course of inter State trade or commerce under Article 286 (2) of the Constitution as it stood at the relevant period

2 The High Court answered the first question in the negative and against the assessee. It answered the second question in the affirmative and in favour of the assessee. The assessee has not come up in appeal. This appeal has been brought by the State of Bihar contesting the correctness of the opinion given by the High Court on the second of the two questions referred to earlier.

3 The assessee is a Public Limited Co., incorporated under the Indian Companies Act, 1913. It carries on business of manufacturing and selling *inter alia* trucks and bus chassis and spare parts thereof to their appointed dealers, State Transport Organizations and individual buyers throughout India. The registered office of the assessee is at Bombay but its factory where manufacturing process is being carried on is at Jamshedpur in Bihar. The assessee has appointed several dealers all over India for the sale of its trucks, bus chassis and spare parts. Those dealers are appointed under agreements entered into between them and the assessee. The turnover in dispute relates to the sales made by the assessee to its dealers of trucks, bus chassis and spare parts for being sold in the territories assigned to them under the dealership agreements. The agreements between the assessee and its dealers appear to be similar. Under the agreements, each dealer is assigned a territory in which alone he can sell the trucks, bus chassis and other spare parts purchased by him from the assessee-company. He is forbidden from selling any one of those articles to any purchaser outside his territory. As per the agreements, dealers will have to place their indents, pay the price of the goods

to be purchased and obtain delivery orders from the Bombay office of the assessee. In pursuance of those delivery orders, trucks, bus chassis and other spare parts were delivered in Bihar to be taken over to the territories assigned to them. Under the contracts of sale, the dealers were required to remove the trucks, bus chassis and the spare parts delivered to them in the State of Bihar to places outside Bihar. These are facts found by the Board of Revenue and affirmed by the High Court. On the basis of these facts, we have to decide whether the sales with which we are concerned in this appeal are sales that took place in the course of inter State trade and commerce as contemplated by Article 286 (2) of the Constitution as it stood at the relevant time. In other words the question for decision is whether the sales in question were sales for the purpose of inter-State trade or commerce or whether they were sales in the course of inter State trade or commerce. As seen earlier, the High Court has held that those sales took place in the course of inter-State trade or commerce.

4 The expression "in the course of" appearing in Article 286 (1) (b) came up for consideration in *State of Travancore-Cochin and others v. The Bombay Co., Ltd.*¹ Therein this Court held that whatever else may or may not fall within Article 286 (1) (b) of the Constitution, sales and purchases which themselves occasion the export or import of the goods as the case may be out of or into, the territory of India come within the exemption. In that case this Court further observed that a sale by export involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated and the sale and the resultant export form parts of a single transaction. Of these two integrated activities which together constitute an export sale, whichever first occurs can well be regarded as taking place in the course of the other. Even in cases where the property in the goods passed to the foreign buyers and the sales were thus completed,

within the State before the goods commenced their journey from the State, the sales must be regarded as having taken place in the course of the export and therefore exempt under Article 286 (1) (b). The same exposition of the law is true of clause (2) of Article 286 as it stood prior to its amendment on 11th September, 1956.

5. The next decision in which Article 286 (1) (a), 1 (b) and (2) came to be considered by this Court is *State of Travancore Cochlin and others v. Shanmugha Vilas Cashew Nut Factory and others*¹. Therein this Court observed that the word 'course' etymologically denotes movement from one point to another and the expression "in the course of" in Article 286 (1) (b) not only implies a period of time during which the movement is in progress but postulates also a connected relation. Consequently, a sale in the course of export out of the country should be understood in the context of Article 286 (1) (b) as meaning a sale, taking place not only during the activities directed to the end of exportation of the goods out of the country, but also as part of or connected with such activities. But a purchase of goods for the purpose of export is only an act preparatory to their export and not an act done in the course of the export of the goods.

6. In *The Bengal Immunity Company Ltd. v. The State of Bihar and others*², Venkatarama Ayyar, J., observed that a sale could be a sale in the course of inter-State trade only if two conditions concur: (1) a sale of goods and (2) a transport of those goods from one State to another under the contract of sale.

7. In *Endupuri Narasimham and son v. The State of Orissa and others*³, this Court held that in order that a sale or purchase might be inter-State, it is essential that there must be a transport of goods from one State to another under the contract of sale or purchase. A purchase made inside a State, for sale outside the State cannot itself be held to be in the course of inter-State and the imposition of tax

thereon is not repugnant to Article 286 (2) of the Constitution.

8. In *Tata Iron & Steel Co. Ltd. v. S.R. Sarkar and others*¹, this Court held that within clause (b) of section 3 of the Central Sales Tax Act, 1956, are included sales in which property in the goods passes during the movement of the goods from one State to another by transfer of documents of title thereto and also covers sales in which movement of goods from one State to another is the result of a covenant or incident of the contract of sale and property in the goods passes in either State. Clause (b) of section 3 of the Central Sales Tax Act, 1956 says :

"That no law of a State shall impose or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place in the course of the import of goods into, or export of the goods out of, the territory of India."

9. In *The Cement Marketing Co. of India (Private) Ltd. and another v. The State of Mysore and another*², this Court held that where the goods were transported outside the State as required by the contract of sale, they are inter-State sales and hence exempt from sales-tax. On the facts of that case it was held that the sales transactions themselves involved movement of goods across the border.

10. In *Ban Gorm Nilgiri Plantations Co., Coonoor and others v. Sales Tax Officer, Special Circle, Ernakulam and others*³, this Court had to consider what sales are sales in the course of export and what sales are for the purpose of export. In the course of the judgment Shah, J. (one of us), observed :

"A sale in the course of export predicates a connection between the sale and export, the two activities being so integrated that the connection between the two cannot be voluntarily interrupted, without a breach of the contract or the compulsion arising from the nature of the transaction. In this sense to constitute a sale in the course of export it may be said that there must be an intention on the part of both the buyer and the seller to export, there must be obli-

1. (1953) S.C.J. 471 : (1953) 2 M.L.J. 123 : (1954) S.C.R. 53.

2. (1955) S.C.J. 672 : (1955) 2 M.L.J. (S.C.) 168 : (1955) 2 S.C.R. 603.

3. (1962) 1 S.C.J. 54 : (1962) 1 M.L.J. (S.C.) 32 : (1962) 1 An.W.R. (S.C.) 32 : (1962) 1 S.C.R. 314.

1. (1961) 1 S.C.R. 379.
2. (1964) 2 S.C.J. 287 : (1963) 3 S.C.R. 777 : (1963) 14 S.T.C. 175.
3. (1964) 2 S.C.J. 693 : (1964) 7 S.C.R. 706.

gation to export, and there must be an actual export. The obligation may arise by reason of statute, contract between the parties or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export. A transaction of sale which is a preliminary to export of the commodity sold may be regarded as a sale for export, but is not necessarily to be regarded as one in the course of export, unless the sale occasions export.

11 In *A G Khosla & Co (P) Ltd v Deputy Commissioner of Commercial Taxes Madras*¹ this Court held that before a sale could be said to have occasioned the import, the movement of goods must have been incidental to the contract or in pursuance of the conditions of the contract and there should be no possibility of the goods being diverted by the assessee for any other purpose meaning thereby that there should be no possibility of diversion according to law or contract and not in breach of them.

12 In *Tata Engineering and Locomotive Co Ltd v The Assistant Commissioner of Commercial Taxes and another*², this Court after referring to the earlier decisions observed

"It has been laid down that the sale in the course of export predicated connection between the sale and export the two activities being so integrated that the connection between the two cannot be voluntarily interrupted without a breach of the contract or the compulsion arising from the nature of the transaction. To occasion export there must exist such a bond between the contract of sale and the actual exportation that each link is inextricably connected with the one immediately preceding it. The principle thus admits of no doubt according to the decisions of this Court, that the sales to be eligible to tax under the Act (Central Sales Tax Act, 1956) must be shown to have occasioned the movement of the goods or articles from one State to another. The movement must be the

result of a covenant or incident of the contract of sale."

13 If we apply the principles enunciated by this Court in the decisions referred to above to the facts of this case, it is obvious that the sales with which we are concerned in this case are sales in the course of inter-State trade. The dealers were required to move the trucks, buses, chassis and other spare parts purchased by them from the State of Bihar to places outside Bihar. They are so required by the terms of the contracts entered into by them with the assessee. They would have committed breach of their contracts and incurred the penalty prescribed in their dealership agreements, if they had failed to abide by the term requiring them to move the goods outside the State of Bihar.

14 The decided cases establish that sales will be considered as sales in the course of export or import or sales in the course of inter-State trade and commerce under the following circumstances:

(1) When goods which are in export or import stream are sold,

(2) When the contract of sale or law under which goods are sold require those goods to be exported or imported to a foreign country or from a foreign country as the case may be or are required to be transported to a State other than the State in which the delivery of goods takes place, and

(3) whereas as a necessary incidence of the contract of sale goods sold are required to be exported or imported or transported out of the State in which the delivery of goods takes place.

15 But Mr A K Sen learned Counsel for the State of Bihar contended that this Court has taken a different view of the law in *Coffee Board, Bangalore v Joint Commercial Tax Officer Madras and another*³. According to him the ratio of that decision is that whenever goods are delivered in a State in pursuance of a contract of sale, the sale in question becomes eligible to tax in the State in which the goods are delivered unless they are taken out of the State for purposes of consumption and not resale, or the same is taken out of the State in pursuance of an already existing agreement to

¹ (1966) 17 STC 473 (1966) 2 MLJ (SC) 81 (1966) 2 AWR (SC) 81 (1966) 2 SCJ 703

² (1970) 1 SCC 622 (1970) 2 SCJ 694 26 STC 354 (1971) B.L.J. 91 (1971) B.L.J.R. 289 A.L.R. 1970 SC 1281

³ (1971) 1 SCJ 14 (1970) 25 STC 528 : A.L.R. 1971 SC 870

resell in the State to which it is taken. The decision in *Coffee Board case*¹, does not, in our opinion afford any basis for these contentions.

16. We have earlier noticed that this Court in a series of decisions has pronounced in unambiguous terms that where under the terms of a contract of sale, the buyer is required to remove the goods from the State in which he purchased those goods to another State and when the goods are so moved, the sale in question must be considered as a sale in the course of inter-State trade or commerce. This is a well established position in law. In the *Coffee Board case*¹, this Court did not deviate from this position nor could it deviate as the earlier decisions were binding on it. Further in the course of his judgment, the learned Chief Justice who spoke for the Court referred with approval to the earlier decisions of this Court where distinction between the sales in the course of inter-State trade or commerce and sales for the purpose of inter-State trade and commerce were explained. On the basis of the facts in that case, his Lordship came to the conclusion that the export of the coffee in question was not integrated with the sales with which the Court was concerned and that there was no direct bond between the export and the sales. In the course of his judgment his Lordship observed:

“Here there are two independent sales involved in the export programme. The first is a sale between the Coffee Board as seller to the export promoter. Then there is the sale by the export promoter to a foreign buyer. Of the latter sale, the Coffee Board does not have any inkling when the first sale takes place. The Coffee Board’s sale is not in any way related to the second sale. Therefore, the first sale has no connection with the second sale which is in the course of export, that is to say, movement of goods between an exporter and an importer”.

17. This finding clearly brings out the distinction between the facts of the *Coffee Board’s case*¹, and the facts of the cases wherein this Court held that the sales in question were sales in the

course of export or import. In the *Coffee Board’s case*¹, this Court found that what was insisted on by the Coffee Board was that the coffee set apart for the purpose of the export must be exported, it was not incumbent for the purchasers at the auction to export that coffee themselves; they may do it themselves or they may sell it to somebody who may export it outside India. On that basis this Court came to the conclusion that the sales effected by the Coffee Board are not sales in the course of export, they are only sales for the purpose of export. The ratio of that decision does not bear on the facts before us. Herein, under the terms of the contracts of sale, the purchasers were required to remove the goods from the State of Bihar to other States. Hence the sales with which we are concerned in this case must be held to be sales in the course of inter-State trade or commerce.

18. For the reasons mentioned above, we agree with the findings of the High Court. In the result this appeal fails and the same is dismissed with costs.

S.V.J.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT.—*J. C. Shah, C.J. and K. S. Hegde, J.*

The State of Assam and others

*Appellants**

v.

Rameshwar Agarwala and others

Respondents.

Assam Land Revenue Regulations—Rule 40 of the Rules framed under—Settlement of Tea garden (property of Government)—Fixation of premium—Power of Government.

Words and Phrases—“Locality”.

The expression “locality” is not defined in the Act or in the Rules. In settling the premiums to be fixed in respect of its own property the Government is not bound to fix the premium generally in respect of a region. The Government is

1. (1971) 1 S.C.J 14 : (1970) 25 S.T.C. 528 : A.I.R. 1971 S.C 870.

*C.A. No. 658 of 1967.

6th January, 1971.

1. (1971) 1 S.C.J 14 : (1970) 25 S.T.C. 528 : A.I.R. 1971 S.C. 870.

by the Act or the rules not disqualified from fixing the premium to be paid in respect of an individual tea garden. In the absence of any indication to the contrary a tea garden may be appropriately regarded as a locality within the meaning of rule 40. The power to settle a tea garden on payment of land revenue, value of the timber and premium is to be exercised according to the rules. The rate of premium may be fixed by the Government according to its commercial value. In the absence of any restriction imposed upon the State Government requiring that a general rate shall be fixed covering a specified area larger than a tea garden there is nothing which prohibits the State Government from fixing the rate of premium having regard to the commercial value of the tea gardens. The matter rested entirely in contract between the respondent and the State Government. [Paras 4 and 5]

The High Court had no jurisdiction to compel the State to enter into a contract to settle the tea garden upon the respondent on payment of premium after determining a general rate for a region larger than the tea garden.

[Para 5]

Appeal from the Judgment and Order, dated the 28th June, 1966 of the Assam and Nagaland High Court in Civil Rule No. 295 of 1964.

Mr Nasmit Lal, Advocate, for Appellant.

Mr Sarjoo Prasad, Senior Advocate (*S N Prasad*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Shah CJ—On 24th October, 1957, Rameshwar Agarwala—hereinafter called 'the respondent' applied to the Deputy Commissioner Lakhimpur for settlement of a tea garden for "special cultivation of tea. By order dated 11th March, 1964, the Government of Assam permitted settlement of the tea garden for special tea cultivation on payment of Rs 3,86,008 as premium. The respondent failed to pay the amount demanded. The State of Assam then put up the tea garden for auction. The respondent moved a petition in the High Court of

Assam for an order declaring that in fixing the amount of the premium at Rs 3,86,008 the State acted illegally, and that the order was void and unenforceable at law because in fixing the amount of the premium the State acted without jurisdiction and the order directing auction of the tea garden for not depositing the amount demanded was also illegal. The High Court upheld the contention and ordered the State of Assam not to give effect to the order dated 31st March 1964, calling upon the respondent to pay the amount due within two months of the order and the order dated 26th November, 1964 directing that the tea garden be put up for auction. With certificate granted by the High Court, the State of Assam has appealed to this Court.

2 The tea garden belonged to the State of Assam. The Government of Assam in the absence of any binding statutory provision, could settle the tea garden on such commercial terms it could reasonably obtain. The respondent applied to the Deputy Commissioner for settlement of the tea garden and requesting the State Government for early fixation of the amount of premium. When the premium was fixed by the Government the respondent protested, contending that the action of the State was illegal. Before the High Court it was contended by the Respondent that the power of the State Government to fix the premium for which it could lease the tea garden was restricted by Rule 40 framed under the Assam Land Revenue Regulations. The Rule reads

'In addition to the land revenue payable under rule 17 and value of the timber assessed under rule 37, an applicant to whom a lease for special cultivation is granted shall be liable to pay premium. The rate of premium shall be fixed by the State Government from time to time for each locality* * *'

3 The reasons which persuaded the High Court to uphold the plea raised by the respondent may be set out in their own words

"The only power which the Government has got is to fix the rate of premium under rule 40 of the Rules under the Land Revenue Regulation and the question for us to consider is whether the order of the Government fixing the

premium for settlement of this land for special cultivation is an order in conformity with rule 40 * * * * *. In our opinion, what rule 40 provides is to confer upon the Government power to fix the rate of premium in every case which shall be payable for the settlement and it is only the Deputy Commissioner that is authorised to settle the land. The whole purpose of rule 40 is to confer power on the Government to fix the rate of premium which will be valid for a particular locality and that the Deputy Commissioner has to make the settlement. He is given the power to realise the premium fixed by the Government from time to time and that no document of lease is to be issued before the premium has been paid by the intending holder. But rule 40 does empower, in our opinion, the State Government to fix the amount of premium in the case of a particular settlement in a particular locality * * *.

.....The power under rule 40 is a general power for fixing the rate of premium for a particular locality and the Legislature when framing the rules never intended that the Government should be empowered to fix the total amount of premium payable by the intending holder. In our opinion, therefore, the order passed by the Government directing the authorities to offer the land for settlement in case the petitioners pay Rs. 3,86,000 is not in conformity with Rule 40 and this order cannot be given effect to."

4. The expression "locality" is not defined in the Act or in the Rules. We see no warrant for the assumption made by the High Court that in settling the premium to be fixed in respect of its own property, the Government is bound to fix the premium generally in respect of a region. The Government is by the Act or the Rules not disqualified from fixing the premium to be paid in respect of an individual tea garden. In the absence of any indication to the contrary a tea garden may in our judgment be appropriately regarded as a locality within the meaning of Rule 40. The power to settle a tea garden on payment of land revenue, value of the timber and premium is to be exercised according to

the Rules. The rate of premium may be fixed by the State Government according to its commercial value. In the absence of any restriction imposed upon the State Government requiring that a general rate shall be fixed covering a specified area larger than a tea-garden there is nothing which prohibits the State Government from fixing the rate of premium having regard to the commercial value of the tea garden. In the present case the Sub-Divisional Officer reported that the price of the land of the Dirpai tea garden be valued at Rs. 500 per *bigha* and on that basis the State Government computed the premium to be paid in respect of the entire Jokai Tea Garden.

5. Fixation of a rate of Rs. 500 per *bigha* in respect of the entire area of the tea garden may be regarded as a premium fixed for the locality of the tea garden. The matter rested entirely in contract between the Respondent and the State Government. There was an offer by the respondent for settlement of the tea garden. He agreed to pay the land revenue payable under rule 17. He also agreed to pay the value of the timber assessed under rule 37. For settlement of the tea garden for special cultivation the respondent was also liable to pay premium. The quantum of liability to pay land revenue was governed by rule 17 and value of the timber was governed by rule 37. The liability to pay premium had to be fixed by the State Government. In the absence of any restriction placed by the Rules upon the power of the State Government, we do not think that the High Court had any jurisdiction to compel the State to enter into a contract to settle the tea garden upon the respondent on payment of premium after determining a general rate for a region larger than the tea garden.

6. The High Court was in error in setting aside the order passed by the Government of Assam and in declaring that the offer to settle the land of the Dirpai Tea Garden on payment of Rs. 3,86,008 was not in conformity with rule 40. The High Court also erred in directing that auction of the land for non-payment of the premium shall be set aside.

7. The appeal is allowed and the petition filed by the respondent will be dis-

missed The respondent will pay the costs in this Court and in the High Court
S V J ——— Appeal all well

THE SUPREME COURT OF INDIA (Civil Appellate Jurisdiction)

PRESENT — J C Shah, Chief Justice K S Hegde and A N Grover, JJ

The Divisional Forest Officer, South Kangru Division, Gauhati and others
Appellants*

Moolchand Saraugi Jain Respondent
Assam Forest Regulation (VII of 1891), section 75 and Rule 10 framed thereunder—Scope and applicability—Tender to quarry stones—Failure to carry out obligations of tender—Resort to Act for recovery of amount—Propriety of Words and Phrases—‘Stone whether forest produce

The amount claimed to be due is not on account of the price for any forest produce or of expenses incurred in the execution for recovery of any forest produce The amount is also not due in the execution of the Regulation Section 75 of the Act cannot avail for recovery of damages

[Para 5]

The rule (rule 10 framed under the Regulation and relied on by appellant does not apply to recovery of the amount due for failure to carry out the obligations of the tender by proceedings under the Assam Forest Regulation, 1891 ‘Stone is not forest produce within the meaning of the Act The rule does not give rise to any liability to pay a sum It merely imposes a limitation upon the power of the officers of the forest department to grant leases in respect of certain forest produce It is a rule relating to the exercise of power to grant leases

[Para 5]

Appeal from the Judgment and Order, dated the 28th July, 1966 of the Assam and Nagaland High Court in Civil Rule No 242 of 1964

Nasunt Lal Advocate, for Appellant
D N Mukherjee, Advocate, for Respondent

The Judgment of the Court was delivered by

Shah, C J —The Divisional Forest Officer, Kamrup Division, Assam invited tenders

or the purchase of monopoly rights to quarry stone from certain areas, including Narengi Stone Quarry Mahal for the period of 1st July, 1963 to 30th June 1964 Mool Chand Saraugi—herein after called ‘the respondent submitted a tender accompanied by the requisite deposit of Rs 100 as earnest money, and offered the rate of Rs 5 25 per rupee of royalty The tender submitted by the respondent was accepted and for the minimum quantity of 1,25,000 cft of stone allotted to the respondent out of the quarry he was to pay Rs 31,250 Intimation of acceptance of the tender was given to the respondent on 13th July 1963

2 One Baputi Ram, a member of a scheduled tribe, appealed against the order of the Divisional Forest Officer accepting the tender, to the Government of Assam and obtained a stay order After about three months he declined to prosecute the appeal and his appeal was dismissed The respondent then declined to accept the settlement of the quarry

3 The Divisional Forest Officer invited fresh tenders The offers made were not however accepted and tenders were invited again On 10th January, 1964 a settlement was made for a minimum quantity of 50,000 cft for the period for 25th January, 1964 to 30th June, 1964 for Rs 10,000

4 The Divisional Forest Officer, there after, sought to recover the amount of Rs 31,250 for which the tender of the respondent was accepted as arrears of land revenue in the manner provided by section 75 of the Assam Forest Regulation VII of 1891 The respondent then moved a petition in the High Court of Assam for an order quashing the proceeding for recovery of the amount demanded The High Court held that the amount claimed was not recoverable under the provisions of the Assam Forest Regulation VII of 1891 and passed an order quashing the proceeding for recovery and issued a *mandamus* to the Divisional Forest Officer Kamrup Division not to proceed with the recovery The State of Assam has appealed to this Court with certificate granted by the High Court

5. Section 75 of the Assam Forest Regulation VII of 1891 provides:

"All money, other than fines, payable to Crown under this Regulation, or under any rule made thereunder, or on account of the price of any forest produce, or of expenses incurred in the execution of this Regulation in respect of any forest produce, may, if not paid when due, be recovered under the law for the time being in force as if it were an arrear of land revenue."

The amount claimed to be due from the respondent is not on account of the price of any forest produce, or of expenses incurred in the execution for recovery of any forest produce. The amount is also not due in the execution of the Regulation. So far there is common ground. It was claimed, however, that the amount was due under rule 10 promulgated in exercise of power under the Regulation and on that account it was recoverable as an arrear of land revenue. Rule 10 provides:

"No lease for any fixed period giving the right of removing India rubber, cane, *kutch* or cutch, lac, agar, ivory, or any other forest produce shall be given otherwise than in accordance with the general or special orders of the Conservator who is empowered to authorise sales in respect of such leases, by auction, tender or any other method at such rates as he may decide in his discretion."

The Rule in our judgment does not apply to recovery of the amount alleged to be due for failure to carry out the obligations of the tender by proceedings under the Assam Forest Regulation, 1891. It is again difficult to hold that "stone" is forest produce within the meaning of the Act. In any event the Rule does not give rise to any liability to pay a sum of money. It merely imposes a limitation upon the power of the Officers of the Forest Department to grant leases in respect of certain forest produce. The lease may not be granted except in accordance with the general or special orders of the Conservator who alone is empowered to authorise a sale in respect of such a lease. It is a rule relating to the exercise of power to grant leases. The High Court was, in our judgment, right in observing that the amount of

damages for breach of the terms of the sale notice is not an amount due under the Regulation, or rule 10 made thereunder.

6. The appeal accordingly fails and is dismissed with costs.

S.V.J.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT. — J. C. Shah, Chief Justice
K. S. Hegde and A. N. Grover, JJ.

Dayaram and others

*Appellants**

v.

Dawalatshah and another

Respondents.

(A) *Constitution of India (1950), Article 133—Concurrent finding regarding genuineness or otherwise of will—Interference by Supreme Court.*

Sitting in appeal, the Supreme Court is not justified in interfering with the conclusion recorded by the trial Court and confirmed by the High Court on what is essentially a conclusion on a question of fact. [Paras 7 and 8.]

(B) *Hindu Law—Zamindari (Impartible)—Succession—Two or more claimants equally removed from common ancestor—Preference.*

If the holder dies leaving him surviving no son legitimate or adopted, the Zamindari devolves upon a descendant from the common ancestor of the nearest degree and in the event of there being more descendants from the common ancestor in the same degree, the descendant in the senior line is preferred. By the use of the expression, 'nearest male relative' the test of propinquity alone may be applied and when there are two or more claimants equally removed from the common ancestor the eldest male member in the senior-most line will be preferred. In determining a single heir according to the rule of primogeniture the class of heirs who would be entitled to succeed to the property if it were partible must be ascertained first, and then the single heir applying the special rule must be selected. [Paras. 14, 15 and 16.]

(C) *Hindu Law—Zamindari estate—Wajib ul-Arz—Interest of Zamindar—Whether life estate*

The right of the Governor to remove a holder who is disloyal or does not manage his estate properly or does not improve cultivation or is otherwise of 'bad behaviour' or guilty of bad administration, does not involve a condition that the interest of the Zamindar is only for his life. The power to take extraordinary steps to protect the Zamindari by the removal of the holder does not restrict the title of the Zamindar to a mere life interest. The incidents of the tenure are restrictions on the estate of the Zamindar but those restrictions do not make him a mere life tenant. [Paras 18 and 17]

(D) *Hindu Law—Zamindari—Wajib ul-Arz—Power of Governor to pass orders—Nature of—Whether quasi judicial*

Where the Succession to the Zamindari is governed by the law of lineal primogeniture selection of a member of a junior branch in preference to a member of the senior branch (by the Governor) would be plainly illegal. [Para 19]

The Governor is invested with quasi judicial power, and if there be a dispute, the dispute must be decided after holding an inquiry, and the decisions must be reached consistently with the rules of natural justice and in accordance with the custom of the family. A bald statement that the 'Government are pleased to recognise Dayaram Bapu, son of Ballarshah Bapu as Zamindar of Dhanora. Zamindari does not disclose the reason for rejecting the claim of Pratapshah who according to the custom of the family, was the nearest male relative. The decision of the Governor was apparently reached without any inquiry and was plainly contrary to the rules of Hindu law and the customs of the family in the light of which alone the Governor was by the express mandate competent to adjudicate the claim. [Para 20]

(E) *Evidence Act (I of 1872), section 35—Order of Naib Tahsildar in mutation proceeding based on untrue evidence—Evidentiary value of*

The decision of the Naib Tahsildar in a mutation proceeding even as a piece of evidence has little evidentiary value when

it is founded on a material piece of evidence which is untrue. The decision in appeal of the Deputy Commissioner suffers from the infirmity. [Para 21]

(F) *Civil Procedure Code (V of 1908), section 9—Impartible estate—Succession—Orders of Governor and Revenue Authority—Court's jurisdiction, whether barred, to decide kinship*

The orders passed by the Governor and the revenue authority do not exclude the jurisdiction of the civil Court to decide the question of kinship. [Para 22]

(G) *Madhya Pradesh Abolition of Proprietary Rights (Estates Mahals, Alienated Lands) Act (I of 1951), section 14—Scope of—Jurisdiction of Compensation Officer to determine competing claims of persons to proprietary rights to property vesting in Government—Jurisdiction of civil Court*

Section 14 is intended to determine only the proprietary rights in the land *qua* State. The Compensation Officer is entitled to decide a question only regarding the proprietary right in the property divested under section 3. He is not concerned with determination of any question relating to private dispute between two or more persons who make competing claims in the matter of compensation, relying upon their respective titles. It is not intended by an order under section 14 to determine complicated questions of title by the adjudication of a revenue officer in a summary inquiry and to make his adjudication conclusive unless a suit be filed within two months from the date of order. Section 14 does not invest the Compensation Officer with jurisdiction to determine competing claims of persons claiming proprietary rights to the property vesting in the Government. [Para 23]

Appeal from the Judgment and Decree dated the 2nd August, 1965 of the Bombay High Court, Nagpur Bench in Appeal No. 113 of 1959 from Original Decree.

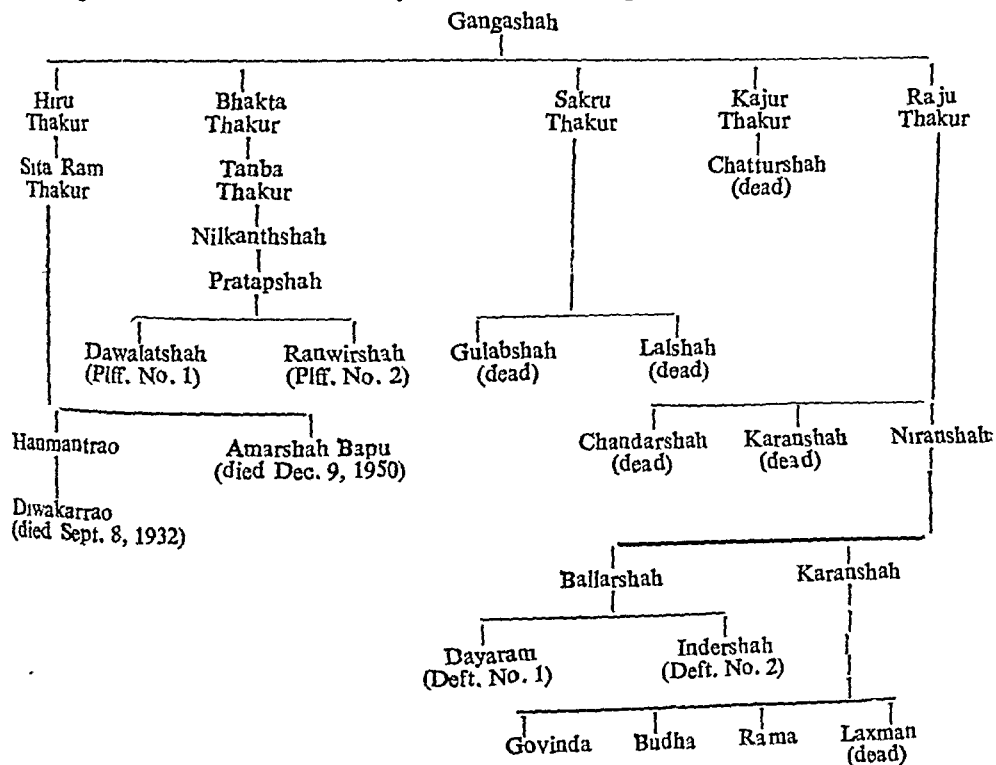
I S Desai, Senior Advocate (V N Suamy, K Rajendra Chaudhuri and K R Chaudhuri, Advocates with him), for Appellants
M N Phodke and A G Ratnaparkhi, Advocates for Respondents

The Judgment of the Court was delivered by

Shah, C J—Dawalatshah and Ranvirshah sons of Partapshah instituted an action

in the Court of the Additional District Judge, Chanda, for a decree for possession of property immovable (including the *Zamindari* of Dhanora) and movable specified in the Schedule, annexed to the plaint, and for an order for payment of mesne profits and also for recovery of the

amount of compensation in respect of certain lands received by the defendants from the Government of Madhya Pradesh and for an order declaring their right to receive the balance of compensation remaining to be paid. The plaintiffs relied upon the following genealogy :



2. The plaintiffs claimed that the property in suit originally belonged to Gangashah. Gangashah had five sons : Hiru, Bhakta, Sakru, Kajur and Raju. The branches of Sakru and Kajur became extinct a long time ago. The branch of Hiru (who was the eldest among the five sons of Gangashah) became extinct with the death of Amarshah on 5th December, 1950. The plaintiff's claimed the *Zamindari* held by Amarshah relying upon the rule of primogeniture, and the other estate of Amarshah as devisees under the will of Amarshah executed on 3rd December, 1950. They submitted that the Dhanora *Zamindari* was granted to Sitaran, ancestor of Amarshah as an impartible estate, devolving by the rule of primogeniture ; that the *Zamindari* on that account devolved on the death of Amarshah upon Pratapshah and that on the death of Pratapshah the *Zamindari* devolved upon the first plaintiff. The

plaintiffs also claimed that the other property including *Malguzari* lands devolved upon them under a will executed on 3rd December, 1950, whereby Amarshah devised his estate in their favour. Accordingly the first plaintiff claimed that he was entitled to the *Zamindari* on the death of Pratapshah on 27th January, 1951 and the plaintiffs claimed the other estate of Amarshah as devisees under his will. The plaintiffs submitted that Dayaram the first defendant took wrongful possession of the *Zamindari* and other property, movable and immovable of Amarshah.

3. The defendants by their written statement maintained that the genealogical table set up by the plaintiffs was incorrect, that by the order of the Governor of Madhya Pradesh dated 9th November, 1951, the *Zamindari* was conferred upon the 1st defendant Dayaram

as he was found suitable to hold the *Zamindari* and the decision of the Governor was binding upon the plaintiffs that the decision of the Compensation Officer regarding *Malguzari* lands which vested in consequence of the enactment of the Madhya Pradesh Abolition of Proprietary Rights (Estates Mahals Alienated Lands) Act I of 1951, had become binding and conclusive against the plaintiffs because no suit challenging the decision was instituted within two months from the date thereof and the plaintiffs were on that account not entitled to claim the compensation paid or payable in respect of the *Malguzari* lands, that Amarshah did not execute the will set up by the plaintiffs and that Amarshah had made a will dated 8th December 1950 under which his estate was devised in favour of the defendants

4 The Trial Court held that the Dhanora *Zamindari* was impartible and was governed by the rule of primogeniture and Pratapshah father of the plaintiffs being the eldest member of the senior most branch from among the descendants of the common ancestor Gangashah was entitled to the *Zamindari* that the plaintiffs were entitled to receive compensation in respect of the *Malguzari* lands and the decision of the Compensation Officer did not operate to deprive the plaintiff of the right to those lands or compensation payable in respect thereof that the will set up by the plaintiffs dated 3rd December, 1950 was genuine and the plaintiffs were under the will entitled to the estate devised in their favour by Amarshah that the will dated 8th December 1950, set up by the defendants was 'a fabricated will and conferred no right or title upon the defendants, and that the genealogical table set up by the plaintiffs represented the true relationship between the descendants of Gangashah

5 In appeal by the defendants the High Court of Bombay confirmed the decree of the Trial Court with a slight modification. The High Court held that the genealogical table set up by the plaintiffs was correct, that according to the custom governing succession Dhanora *Zamindari* devolved upon Pratapshah on the death of Amarshah, and on the death of Pratapshah the first plaintiff became

entitled to the *Zamindari*, that the order of the Governor recognising Dayaram as *Zamindar* was not binding and conclusive, for it was not shown that in making the order the Governor had acted in exercise of the power conferred by the Chanda Patent, that the order was contrary to the customs and the law governing the *Zamindari*, that the decision of the Governor did not oust the jurisdiction of the Civil Court, that the will dated 8th December, 1950, set up by the defendants was not genuine and the will set up by the plaintiffs dated 3rd December, 1950 was genuine, and that the plaintiffs' suit with regard to *Malguzari* lands was not barred by the decision of the Compensation Officer. The High Court accordingly confirmed the decree passed by the Trial Court in respect of the *Zamindari* relying upon the rule of inheritance incorporated in the *Wajibul* etc. of the Chanda District and by success on under the will dated 3rd December, 1950 in respect of the other property except as to certain occupancy lands held by Amarshah

6 With certificate granted by the High Court the defendants have appealed to this Court

7 Certain concurrent findings on which not much argument was advanced at the Bar may first be set out. The High Court agreeing with the Trial Court on appreciation of evidence held that the genealogy set up by the plaintiffs represented the true relationship between the parties. Again the High Court agreeing with the Trial Court held that the will dated 3rd December, 1950 set up by the plaintiffs was genuine while the will dated 8th December, 1950 set up by the defendants was not genuine. The argument that the High Court did not give due weight to certain important circumstances in reaching their conclusion relating to the will set up by the plaintiff is without substance. The circumstances relied upon are that the writing instrument with which the body of the will was written and the writing instrument with which Amarshah, it was claimed, signed or executed the will were different that the will was not registered, that the appearance of the will was suspicious, that the will was unnatural because it devised the estate in favour of the plaintiffs

after giving a life interest in favour of the testator's widow Ratnabai, that the will had not been produced before the revenue authorities and before the Compensation Officer when disputes in relation to the estate of Amarshah were pending before those authorities, and that it was produced for the first time nearly seven years after the death of Amarshah, and that the scribe who wrote the will did not belong to the village to which Amarshah belonged. The Trial Court and the High Court have reached the conclusion that on the circumstances no suspicion as to the genuineness of the will dated 3rd December, 1950 arose. It may be noticed that the plaintiffs were, at the date of their father's (Pratapshah's) death minors and soon after Pratapshah's death their mother abandoned them and remarried. Thereafter no one attended to the pending litigation. Failure to produce the will before the revenue authorities was therefore not a circumstance, in the view of the High Court, which militated against the genuineness of the will. In the view of the Courts absence of registration, appearance of the will, the contents thereof, the dispositions thereunder, and the fact that the writer of the will belonged to another village did not in the circumstances of the case give rise to any suspicion. We do not think that sitting in appeal we would be justified in interfering with the conclusion recorded by the Trial Court and confirmed by the High Court on what is essentially a conclusion on a question of fact.

8 The will set up by the defendants is not proved to be a genuine will executed by Amarshah. This again is a concurrent finding of the two Courts and must be accepted in this Court. No argument has been advanced to persuade us to take a different view. The rights of the parties must be adjudged in the light of these findings.

9. The dispute between the parties relates to three set of properties—

- (a) Dhanora *Zamindari*
- (b) *Malguzari* lands ;
- (c) Occupancy lands and movables.

10. The ancestors of the parties held an extensive *Zamindari* in the Chanda District. After the advent of the British rule, in that region, the revenue authorities

commenced settlement operations. An inquiry was held by the Settlement Officer in connection with the lands held by the family of the parties and statements of some members were recorded. Chhattarshah, son of Kajur stated that the *Zamindari* of Dhanora was standing in the name of his cousin Sitaram and that all the members of the family were joint and maintained themselves out of the income from the *Zamindari*. In his statement Sakru admitted that the rule of primogeniture prevailed in the family. He stated that Hiru was his eldest brother and Sitaram was the son of Hiru and the *Zamindari* was recorded in the name of Sitaram according to *Awwal Haqq* i.e., rule of primogeniture from ancient times, even though he was senior in age, and that there was no quarrel between him and Sitaram and that he and Sitaram were living jointly and were taking the income from the *Zamindari*.

11. The Settlement Officer made an order on 2nd November, 1867, that the "*Zamindari* is of ancient tenure and the present *Zamindar* Sitaram Thakur has proved his right to be *Zamindar* Subject to the conditions to be embodied in patent of proprietary right I confer proprietary right in the *Zamindari* of Dhanora on Sitaram Thakur". The Settlement Officer observed that conferment of proprietary rights was subject to conditions to be embodied in a patent of proprietary rights. It may reasonably be inferred that a formal grant was made in favour of Sitaram. The form of the grant which is known as "Chanda Patent" is reproduced in Aitchison's "Collection of Treaties, Engagements and Sanads" Volume II, pages 573-574. Under the Chanda Patent it was declared that the tenure shall be indivisible, and non-transferable (save to the nearest male heir the transfer in such case being subject to the approval of the Chief Commissioner) the land shall be held by one person, the *Zamindor* or *Zamindari* for the time being and shall be held on conditions of (i) loyalty, (ii) good police administration and (iii) improvement and cultivation of the estate. Clauses V, VI, VII of the grant relating to succession to the *Zamindari* held under the patent :

"V. Subject to the provisions contained in Clause VI, the order of succession shall be as under :—

On the death of the *Zamindar*, the estate shall be devolve upon his eldest son. In default of a son, and when adoption has not taken place, the succession should preferably devolve on the nearest male kinsman the widow receiving suitable maintenance

VI In the event of the first in order of succession being, in the opinion of the local Government, unfit to carry out the conditions of clause IV, the *Zamindaree* shall devolve upon the nearest heir who possesses the required qualification

VII The *Zamindar*, in the case of gross misconduct, shall be liable to removal by the local Government, and if such removal be ordered the succession shall take place as if the *Zamindar* removed had died "

12 Tenure of the grant is entered in the *Wajib ul arz*. The relevant recitals in the *Wajib ul arz* are as follows

PART I

Rights and liabilities of *Zamindar* in relation to Government

(1) *WATAN*

Zamindars *WATAN* is not partible and it cannot be given to anyone other than quite close (the nearest) male heir. Changes taking place in this way should have sanction of the Governor in Council. The *Zamindari* shall be in the name of only one person and the *Zamindari* has been granted to the *Zamindar* in possession at present on the conditions of his remaining loyal to the Government managing his estate properly and improving the cultivation

(2) *HEIRS*

On the death of the *Zamindar* the estate shall devolve upon his eldest son. If there is no legitimate or adopted son it shall devolve upon a very close (the nearest) male relative. If there arises a dispute regarding right of inheritance the Governor-in-Council will decide it in accordance, with the custom in that family. If the Governor in Council finds that the first heir is unable to abide by the conditions stated in *BAB* (clause), the *Zamindari* shall be granted to a quite

close (the nearest) male heir possessing the necessary qualifications

(3) *Dispossessing the Zamindar and forfeiting his rights*

Governor-in Council may dispossess the *Zamindar* on account of his behaviour and bad administration. Such dispossession may be for a few days or permanent. If it is for a few days, the Deputy Commissioner will manage the *Zamindari* on behalf of the *Zamindar* and if the order of dispossession is permanent, the *Zamindar* shall so to say be deemed to have died and the heir will get the right. The entries in the *Wajbul arz* substantially reproduce the terms of the Chanda Patent as set out in Volume II of Atchison's "Collection of Treaties, Engagement and Sanadas "

13 One Major C B Lucie Smith made a report relating to the Land Revenue settlement of the Chanda District, Central Provinces, 1869. At pages 179 to 180 Major Lucie Smith has referred to the *Zamindarees* of the Chanda District. He has stated under the head "*Zamindarees*"

"The *Zamindarees* were settled by me, and in order to explain the principles of settlement adopted it will be necessary to touch first upon the questions of tenure and history

The weight of testimony goes to show that the *Zamindars* are the descendants of men on whom were conferred tracts of country, more or less wild with the object of their being brought under cultivation and order maintained. Naturally, * * * while the law was weak and its administrators distant, the *Zamindar*, as the lord on the spot, exercised large powers but powers apparently never recognised by either the Gond or the Maratta Government. He was undoubtedly regarded as a noble bound to furnish a small contingent when required by his sovereign, but there is nothing to warrant to the supposition that he possessed an absolute right in the soil, indeed, as far as my experience goes, such a right is foreign to the ideas of the races of this part of India "

13 A. The rulers of the day evidently made and unmade *Zamindars* at their pleasure,

* * * * *

"Under these circumstances it appeared that the Chanda Chiefs, though the Nobles of the Country, possessed no absolute right in the soil, and that it rested with Government to confer it; and in conferring it, to prescribe such conditions as might be deemed fitting. A scheme of conditions to be embodied in the patent of proprietary right, and in the administration paper of the *Zamindarees*, was therefore drawn up, based upon the usages actually existing from ancient times; and, with one exception, the proposed arrangements were sanctioned in their entirety by the Government of India, who directed that they were to be taken as a general model for those to be applied to the *Zamindarees* of the Balaghat district and to the non-feudatory *Zamindarees* of Chutteesgurh.

The provision not approved was that on the death of a *Zamindar*, the estate should in default of a son, devolve upon his widow. This mode of succession has obtained among the Chanda Chiefs from time immemorial, and is the rule not only among them but among all classes of landholders in the district. It suits especially the character of the Gond women, * * * * * Government, however, after weighing the arguments urged, decided that it was conducive to the interests of the *Zamindarees* that the succession should devolve only upon a male member of the family, and the clause was altered accordingly."

14. Pratapshah and the 1st defendant Dayaram were descendants of Gangashah and they were related to Gangashah in the same degree. But Pratapshah was the descendant of Bhakta, and Dayaram was the descendant of Raju. Bhakta was the elder of the two brothers. It is recited in the *Wajib-ul-arz* that the Dhanora *Zamindari* is impartible, that on the death of the holder it devolves upon his eldest son and in the absence of a legitimate or an adopted son it devolves upon the nearest male relative. Devolution of the *Zamindari* closely resembles the traditional rule of lineal primogeniture. If the holder dies leaving him surviving no son legitimate or adopted, the *Zamindari* devolves upon a descendant from the common ancestor of the nearest degree

and in the event of there being more descendants from the common ancestor in the same degree, the descendant in the senior line is preferred. Succession to the *Zamindari* is subject to the power of the Governor to dispossess a person found unfit to observe the conditions of loyalty, good police administration and improvement and cultivation of estate. But if the nearest in the line of succession is not selected the estate must be given to the nearest heir who has the prescribed qualifications and is a successor to the *Zamindar*. When the *Zamindar* is removed, succession takes place as if the *Zamindar* so removed had died. By the use of the expression "nearest male relative" the test of propinquity alone may be applied and when there are two or more claimants equally removed from the common ancestor the eldest male member in the seniormost line will be preferred. In adjudging the plaintiffs' claim the Court must determine whether Pratapshah father of the plaintiff's, was the nearest male relative of Amarshah.

15. On the death of Amarshah there were two male relatives: they were Pratapshah father of the plaintiff's and the 1st defendant Dayaram. The contest between them had to be adjudged in the light of the rule of lineal primogeniture governing an impartible estate which are well-established:

"Succession is governed by the rules which governs succession to partible property subject to such modifications only as flow from the character of the impartible estate; the only modification which impartibility suggests in regard to the right of succession is the existence of a special rule for the selection of a single heir when there are several heirs of the same class who would be entitled to succeed to the property if it were partible under the general Hindu law; and in the absence of a special custom, the rule of primogeniture furnishes a ground of preference."

*Subramanya Pandya Chokla Talwar v. Siva Subramanya Pillai*¹. In determining a single heir according to the rule of primogeniture the class of heirs who would be entitled to succeed to the property if it

1. (1894) I.L.R. 17 Mad. 316 at 325:4 M.L.J. 152.

were partible must be ascertained first, and then the single heir applying the special rule must be selected

16 Counsel for the first defendant submitted that under the term of the Chanda Patent the *Zamindari* devolve on the death of the holder on the male relative who is the seniormost in age and not on the eldest member in the senior line. There is nothing in the Chanda Patent which supports that contention. By the use of the expression nearest male relative the rule of primogeniture is prescribed it is not intended to confer the estate upon the eldest male relative of the *Zamindar*.

17 Counsel also submitted that under the terms of the Chanda Patent and the terms recorded in the *Wajib ul arz* the Governor having the right to determine inheritance and the right to remove a person who is not loyal or does not manage the property or does not improve the cultivation or who is guilty of bad behaviour or bad administration it must be assumed that the holder of the *Zamindari* has merely a life interest and on the death of the holder the Governor re-grants the land consistently with the rules of succession according to the law and custom amongst the members of the family but subject to the dominant purpose of good administration and loyalty to the Government. Counsel for the first defendant relied upon certain circumstances which he claimed established that the interest of the *Zamindar* was restricted to his life and on his death there was resumption and re-grant of the *Zamindari* by the Governor. Counsel submitted that the *Zamindari* was impartible and devolved upon the nearest male heir that the sanction of the Governor was necessary for transfer, and also for recording inheritance, that loyalty, good management and improvement of cultivation were the conditions for holding the lands and that if the behaviour of the *Zamindar* was found unsatisfactory or that he was not capable of good administration he was liable to be removed. On that ground said Counsel the Government alone was competent to decide a dispute arising out of inheritance. But the power to take extraordinary steps to protect the *Zamindari* by the removal of the holder does not restrict the title of the *Zamindar* to a mere life interest. The incidents of the tenure are restrictions

on the estate of the *Zamindar* but those restrictions do not make him a mere life-tenant.

18 Under the Chanda Patent the lands of the *Zamindari* held by the family were confirmed in 1867 in favour of Sitaram. On his death they devolved upon Hanmantrao. There is no evidence that any fresh grant was made. On the death of Hanmantrao the lands devolved upon his son Diwakarrao who died on 8th September, 1932. On the death of Diwakarrao dying without leaving any male descendant there arose a dispute between Pratapshah and Amarshah. Pratapshah claimed to be the adopted son of Diwakarrao and on that ground entitled to take the *Zamindari*. An enquiry was held and it was decided that Pratapshah failed to prove the adoption set up by him. On the death of Amarshah again without leaving any male lineal descendant disputes arose. The evidence is not clear as to whether any formal grant was issued in favour of Sitaram. There is no evidence that recognition of the heirs of the successive *Zamindars* was accompanied by the issue of fresh patents or grants. Succession was merely recognised by the revenue authorities. The argument that the grant was for life of the grantee is therefore not supported by the terms of the Chanda Patent, nor by the entries in the *Wajib ul arz* nor by the history of the *Zamindari*. The right to determine inheritance it is true vests in the Governor but the power is exercisable in accordance with and not in violation of the custom of the family. In determining the heir the Governor is not granting fresh the *Zamindari*, he merely determines the successor in accordance with the custom of the family. The right of the Governor to remove a holder who is disloyal or does not manage his estate properly or does not improve cultivation or is otherwise of bad behaviour or guilty of bad administration does not involve a condition that the interest of the *Zamindar* is only for his life. When a holder of the *Zamindari* is removed, the Governor is bound to hand over the *Zamindari* to the next heir in the order of succession as if the *Zamindar* removed had died and the heir will get the right.

19 Counsel then contended that in any event the decision of the Governor in 1930

declaring Dayaram to be the successor on the death of Amarshah was binding and conclusive and could not be reopened. Counsel urged that Pratapshah and the 1st defendant Dayaram were related to the common ancestor in the same degree, and it was open to the Governor to select one of the two members of the family related to the last holder in the same degree, even though the person selected did not belong to the seniormost line. But if succession to the *Zamindari* is governed by the rule of lineal primogeniture, election of a member of a junior branch in preference to a member of the senior branch would be plainly illegal.

20. Again, the evidence does not warrant the view that the Governor purported to pass any order in pursuance of the provisions of the Chanda Patent or the rules of succession recorded in the *Wajib-ul-arz*. The order of the Governor is in the form of a memorandum addressed to the Deputy Commissioner, Chanda, dated 9th November, 1951 and it states that:

“Government are pleased to recognise Shri Dayaram Bapu, son of Ballarshah Bapu Raj Gond as the *Zamindar* of Dhanora *Zamindari* in the Garchiroli *tahsil* of the Chanda District till the date of vesting of the *Zamindari* in the State Government.”

There is no evidence that the Governor made any enquiry to determine the successor of Amarshah. An order by the Governor purporting to exercise powers under the Chanda Patent contemplates a quasi-judicial inquiry. The order does not show that any inquiry was made for determining the rights of the contesting claimants or that any notice was issued to them or that they were heard before the Governor decided the issue. There is nothing in the pleadings in that behalf. The Governor is invested with quasi-judicial power, and if there be a dispute, the dispute must be decided after holding an inquiry, and the decision must be reached consistently with the rules of natural justice and in accordance with the custom of the family. A bald statement that the “Government are pleased to recognise Dayaram Bapu, son of Ballarshah Bapu as the *Zamindar* of Dhanora *Zamindari*” does not disclose the reason for rejecting the claim of Pratapshah who according to the custom of the family was

the nearest “male relative”. There is no evidence on the record that the Governor was even aware that there were other claimants and if he was aware what their claims were and that the Governor had considered those claims before recognizing the claims of Dayaram. In the absence of any evidence that the order was made by the Governor in exercise of the power conferred by the Chanda Patent it is unnecessary to consider whether any order made by the Governor in exercise of the powers of the patent excludes the jurisdiction of the civil Court. The decision of the Governor was apparently reached without any inquiry and was plainly contrary to the rules of Hindu Law and the custom of the family in the light of which alone the Governor was by the express mandate competent to adjudicate the claim.

21. It is true that there were mutation proceedings in regard to the *Zamindari* before the Naib Tahsildar Garchiroli Tehsil. The Naib Tahsildar by his order dated 9th May, 1951, held that the dispute relating to the mutation was raised by Pratapshah, that Amarshah had died issueless, that the genealogical tree set up by Daulatshah, son of Pratapshah was incorrect being unsupported by reliable evidence, that copies of settlement of 1867 were mere statements of interested persons that the genealogical tree filed by Dayaram resembled the genealogical tree filed by Pratapshah and was held to be genuine that Amarshah had clearly admitted in this statement that Dayaram was entitled to succeed to the *Zamindari* after him and that Dayaram was the nearest male kinsman to the deceased Amarshah. This decision of the Naib Tahsildar proceeded upon a genealogy produced by Dayaram which on the findings of the Trial Court as well as the High Court in this case is incorrect. The decision of the Naib Tahsildar in an mutation proceeding even as a piece of evidence has little evidentiary value when it is founded on a material piece of evidence which was untrue. The proceedings were carried in appeal before the Deputy Commissioner. The Deputy Commissioner confirmed the order by his decision dated 8th August, 1951. He also accepted the genealogy set up by Dayaram and held that there were no other nearer male descendants in the

branch and that Pratapshah was one degree more removed than Dayaram. In view of the infirmity attaching to the genealogy relied upon by the Revenue Officer that decision has also little evidentiary value.

22 The orders passed by the Governor and the revenue authorities do not exclude the jurisdiction of the civil Court to decide the question of kinship. In that view we agree with the High Court that the *Zamindari* originally confirmed in favour of Sitaram must according to the tenure as recorded in the *Wajub ul arz* devolve upon the first plaintiff Dawalatshah to the exclusion of the first defendant Dayaram.

23 The right in *Malguzari* land was since the death of Amarshahi extinguished by the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act I of 1951. The *Malguzari* lands are by the devise contained in the will dated 3rd December, 1950 given to the plaintiffs. Compensation in respect of the lands would therefore belong to the plaintiffs. But it is urged that notwithstanding the devise, because of the order of the Claim Officer under section 14 of Act I of 1951, the plaintiffs were not entitled to agitate the question of heirship. It is enacted by section 3 of the Act that on and from a date to be specified by a notification by the State Government in that behalf all proprietary rights in an estate, mahal, alienated village or alienated land as the case may be in the area specified in the notification, vesting in a proprietor of such estate, mahal, alienated village, alienated land, or in a person having interest in such proprietary right through the proprietor shall pass from such proprietor or such other person to and vest in the State for the purposes of the State free of all encumbrances. Section 4 sets out the consequences of the vesting of the land in the Government by virtue of the notification issued under section 3. Section 8 provides for assessment of compensation payable to every proprietor, who is divested of proprietary rights. The compensation is to be determined in accordance with the rules contained in Schedule 1. Section 12 requires that a proprietor who is divested of proprietary rights by virtue of a notification issued under section 3 shall within such period as

may be prescribed, file a statement of claim in the prescribed form and specify the particulars mentioned therein. Section 13 authorises the Compensation Officer to determine the amount of compensation. Section 14 provides

‘(1) If, during the course of an enquiry by the Compensation Officer, any question is raised regarding the proprietary right in any property divested under section 3 and such question has not already been determined by a Court of competent jurisdiction, the Compensation Officer shall proceed to enquire summarily into the merits of such question and pass such orders as he thinks fit.

(2) The order of the Compensation Officer under sub-section (1) shall not be subject to any appeal or revision, but any party may, within two months from the date of such order, institute a suit in the civil Court to have the order set aside, and the decision of such Court shall be binding on the Compensation Officer, but subject to the result of such suit, if any, the Compensation Officer shall be final and conclusive.”

Counsel for Dayaram urged that the Compensation Officer had decided by his Order dated 30th August, 1951 that compensation in respect of the *Malguzari* land was payable to Dayaram and since no suit was filed by the plaintiffs for setting aside that decision, the order of the Compensation Officer became final and conclusive and could not be reopened in a suit filed more than six years after that date. We are unable to accept that contention. The Compensation Officer is entitled to decide a question only regarding the proprietary right in the property divested under section 3. He is not concerned with determination of any question relating to private dispute between two or more persons who make competing claims in the matter of compensation, relying upon their respective titles. A question regarding the proprietary rights may in ordinary course be raised only in a claim against the State, and if that claim be decided against the claimant in a summary inquiry held by the Compensation Officer, a suit to set aside the decision must be filed within two months from that date and if no suit is filed the order becomes final and conclusive.

Section 14 was enacted with a view to put an end to disputes with regard to the claims to proprietary rights which by virtue of the notification issued under section 3 are extinguished. It is not intended by an Order under section 14 to determine complicated questions of title by the adjudication of a revenue officer in a summary inquiry without even a right of appeal and to make his adjudication conclusive unless a suit be filed within two months from the date of the order. That is also clear from the terms of section 35 (7) of I of 1951 which provides:

"The payment of compensation under this Act to the creditors of a proprietor or to the proprietor in accordance with the prescribed manner shall be a full discharge of the State Government from all liability to pay compensation for the divesting of proprietary rights, but shall not prejudice any rights in respect of the said rights to which any other person may be entitled by due process of law to enforce against the person to whom compensation has been paid as aforesaid".

The civil Court is declared competent to determine disputed questions with regard to title to compensation. We agree with the High Court that section 14 of Act I of 1951 does not invest the Compensation Officer with jurisdiction to determine competing claims of persons claiming proprietary rights to the property vesting in the Government by the operation of section 3 of the Act. Section 14 is intended to determine only the proprietary rights in the land *qua* the State. 24. Finally it was urged that the Trial Court granted Rs. 10,000 as mesne profits and even though the High Court disallowed the claim of the plaintiffs with regard to certain items no reduction was made in the total amount of mesne profits awarded corresponding to the claim disallowed. Counsel for the plaintiffs concedes that the High Court was in error in not reducing the amount of the mesne profits awardable to the plaintiffs. He agrees that instead of the figure of Rs. 10,000 awardable to the plaintiff Rs. 8,000 should be substituted. We modify the mesne profits awarded. Subject to this modification, this appeal fails and is dismissed with costs.

Quantum of mesne profits modified; appeal dismissed.

S.V.J.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT.—*J. C. Shah, K. S. Hegde and A. N. Grover, JJ.*

Bhagwant Pundlik, etc. .. Appellants*
v.

Kishan Ganpat Bharasakal and others
Respondents.

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (XCIX of 1958), sections 19, 20 and 36 (1) and (2)—Applicability of section 19—Voluntary delivery of possession by tenant to landlord—No surrender of tenancy in writing, and no verification of surrender by Tahsildar—Validity of landlord's possession—Right of tenant for restoration of possession.

Section 19 provides that notwithstanding any agreement, usage, decree or order of a Court of law tenancy of any land held by a tenant shall not be terminated except in the cases specified therein. Thereby it was intended to make the provisions of section 19, paramount. In section 20 of the Act which deals with surrender it is expressly enacted that surrender shall be in writing and shall be verified in the prescribed manner. Surrender of tenancy which does not comply with the requirements of section 20 is ineffective. Again, sub-section (2) of section 36 imposes a disability upon the landlord from obtaining possession of any land occupied by a tenant except under an order of the Tahsildar. The terms of sub-section (2) of section 36 are explicit; they are not subject to any implication that possession obtained with the consent of the tenant, but without an order of the Tahsildar is valid

[*Para. 4.*]

On facts held, there is no surrender of tenancy in writing and no verification of surrender by Tahsildar. Delivery of possession voluntarily did not render the possession of landlord valid. Under section 36 (1) a tenant who has been evicted in contravention of sub-section (2) may apply in writing to the Tahsildar for such possession.

[*Para. 5.*]

No opinion on the question whether mere verification by the Tahsildar with-

out an order of the Tahsildar authorising the landlord to obtain possession disentitles the tenant to claim possession under section 36 (1) was expressed

[Para 5]

Appeals by Special Leave from the Judgment and Order dated the 15th November, 1963, of the Bombay High Court Nagpur Bench in Special Civil Application Nos 746 and 747 of 1964

S K Mehta and A L Mehta Advocates, for Appellants (In both the Appeals)

M S Gupta, Advocate, for Respondents Nos 1 and 2 (Ir C A No 1409 of 1966)

S S Khanduja, Advocate, for Respondent No 3 (Ir both the Appeals)

The Judgment of the Court was delivered by

Shah, J — Badridas son of Ramgopal was the owner of fields Survey Nos 2 and 9/2 of village Bhamberi talug Akot District Akola. On 26th February, 1958 Badridas granted a lease for cultivation of the land to two brothers Kishan and Manik. At the end of the agricultural year 1958-59 Badridas took possession of the lands from Kishan and Manik representing that he desired to cultivate the lands personally. Badridas cultivated the lands during the agricultural years 1959-60 and 1960-61 and thereafter on 18th January 1961 he granted a lease of the lands for four years to Bhagwant Son of Pundalik. Kishan and Manik then applied on 30th June, 1961 under section 36 (1) of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 for an order restoring possession to them alleging that their eviction from the lands was illegal. The Additional Tahsildar dismissed the application but in appeal the order was reversed. In the view of the appellate authority Kishan and Manik were in 1958-59 tenants of the lands and they were evicted otherwise than in accordance with the law and that they were entitled to be restored to possession under section 36 (1) of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act 1958. In a petition by Bhagwant the Revenue Tribunal reversed the order of the appellate authority. The Tribunal held that since Kishan and Manik had given up possession of the lands voluntarily

and had allowed Badridas to cultivate the lands for the following two years, they had no right to be reinstated into possession of the lands, especially after the lands were let out by Badridas to Bhagwant. Kishan and Manik then moved in the High Court of Bombay at Nagpur, two Special Civil Applications Nos 746 and 747 of 1964 in respect of the two fields Survey Nos 2 and 9/2 separately. The High Court set aside the order of the Revenue Tribunal and directed that an order for possession be made in favour of Kishan and Manik in respect of the two lands. With Special Leave, these appeals have been preferred by Bhagwant.

2 The Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 was brought into force on 30th December, 1958. Section 20 provides

“A tenant may terminate the tenancy at any time by surrendering his interest of a tenant in favour of the landlord

Provided that such surrender shall be in writing and shall be verified before the Tahsildar in the prescribed manner.”

Section 36 of the Act provides

“(1) A tenant * * * entitled to possession of any land * * * under any of the provisions of this Act or as a result of eviction in contravention of sub section (2) may apply in writing for such possession to the Tahsildar * * *

(2) No landlord shall obtain possession of any land * * * held by a tenant except under an order of the Tahsildar. For obtaining such order he shall make an application in the prescribed form and within a period of two years from the date on which the right to obtain possession of the land, * * * is deemed to have accrued to him

* * * * *

3 For the agricultural year 1958-59 Kishan and Manik were tenants in respect of the lands in question. Badridas took possession of the lands at the end of that year. Granting that Kishan and Manik delivered the lands voluntarily there could not under section 20 of the Act be a valid surrender unless the surrender was in writing and verified before the Tahsildar and in the prescribed manner. Possession obtained by

Badridas was not lawful, for Badridas obtained possession of the land from the tenants without complying with the requirements of section 20 and of sub-section (2) of section 36. Sub-section (2) of section 36 prohibits the landlord from obtaining possession of any land held by a tenant except under an order of the Tahsildar. Delivery of possession voluntarily by Kishan and Manik did not render the possession of Badridas valid. Under section 36 (1) a tenant who has been evicted in contravention of sub-section (2) may apply in writing to the Tahsildar for such possession.

4. Counsel for the appellant contended that section 36 (2) does not commence with the expression "Notwithstanding any agreement, usage, decree or order of a Court of law" as section 19 of the Act does, and on that account it may reasonably be inferred that the Legislature intended that only those tenants shall be deemed entitled to possession within the meaning of section 36 (1) who were dispossessed by fraud, coercion or misrepresentation, and not tenants who had voluntarily parted with possession of the lands. We are unable to agree with that contention. Section 19 provides that notwithstanding any agreement, usage, decree or order of a Court of law tenancy of any land held by a tenant shall not be terminated except in the cases specified therein. Thereby it was intended to make the provisions of section 19 paramount. In section 20 of the Act which deals with surrender it is expressly enacted that surrender shall be in writing and shall be verified in the prescribed manner. Surrender of tenancy which does not comply with the requirements of section 20 is ineffective. Again, sub-section (2) of section 36 imposes a disability upon the landlord from obtaining possession of any land occupied by a tenant except under an order of the Tahsildar. The terms of sub-section (2) of section 36 are explicit, they are not subject to any implication that possession obtained with the consent of the tenant, but without an order of the Tahsildar is valid.

5. In a recent judgment, *Madhao S/o. Talya Sonar v. The Maharashtra Revenue Tribunal and others*¹, the High Court of

Bombay held that section 36 (2) is plenary and controls section 20 of the Act. In the present case there is no surrender of tenancy in writing and no verification of surrender by the Tahsildar. We need express no opinion on the question whether mere verification by the Tahsildar without an order of the Tahsildar authorising the landlord to obtain possession disentitles the tenant to claim possession under section 36 (1).

6. The appeals fail and are dismissed. Having regard to all the circumstances, however, we think, there should be no order as to costs in this Court

7. Counsel for the appellant Bhagwant submitted that there are crops standing on the lands, and prayed that the appellant may be allowed to reap them. One month's time from the date of this judgment is given to the appellant to deliver possession of the lands.

S.V.J.

Appeal
dismissed.

THE SUPREME COURT OF INDIA. (Civil Appellate Jurisdiction.)

PRESENT.—*J. M. Shelat, C. A. Vaidialingam and P. Jaganmohan Reddy, JJ.*

M/s Allen Berry & Co., (P.) Ltd.
... *Appellant**

v.

The Union of India ... *Respondent.*

(A) *Arbitration Act (X of 1940), sections 16 and 30—Award—When can be set aside or remitted—Grounds.*

The general rules in matters of arbitration awards is that where parties have agreed upon an arbitrator, thereby displacing a Court of law for a domestic forum they must accept the award as final for good or ill. In such cases the discretion of the Court either for remission or for setting aside the award will not be readily exercised and will be strictly confined to the specific grounds set out in sections 16 and 30 of the Act.

[Para. 5.]

The Court, while examining an award, will look at documents accompanying and forming part of the award. The question whether a contract or clause of it is incorporated in the award is a question of construction of the award. The test is does the arbitrator come to a finding on the wording of the contract? If he does he can be said to have impliedly incorporated the contract or a clause in it whichever be the case. But a mere general reference to the contract in the award is not to be held as incorporating it. The principle of reading contracts or documents into the award is not to be encouraged or extended. As the parties chose their own arbitrator to be the Judge in the dispute between them, they cannot, when the award is good on the face of it, object to the decision either upon the law or facts. Therefore, even when an arbitrator commits a mistake either in law or in fact in determining the matter referred to him, but such mistake does not appear on the face of the award or in a document appended to or incorporated in it so as to form part of it, the award will neither be remitted nor set aside notwithstanding the mistake. [Paras 8 and 15]

(B) Costs—Awarding of by umpire—Interference by Court

Considering the huge amounts claimed by the parties, the volume of evidence, both oral and documentary, adduced by them, the number of days occupied in recording that evidence and in arguing it cannot be said that the discretion which the umpire exercised in the matter of costs was exercised in breach of any legal provision or unreasonably which can justify the Courts intervention.

[Para 26]

Appeal by Special Leave from the Judgment and Order dated the 15th February 1963 of the Punjab High Court Circuit Bench at Delhi in F A O Appeal No 123 D of 1961

R L Agarwal, K L Mehra, S K Mehta, P N Chaddha, M G Gupta and A R Nagaraja Advocates for Appellant

Dr L M Singhai, Senior Advocate (*Badr Dass Sharma* Advocate for *S P Nayar* Advocate with him), for Respondent

The Judgment of the Court was delivered by

Shelat, J—By this appeal, under Special Leave, the appellant-company challenges the correctness of the judgment of the High Court of Punjab, dated 19th February, 1963, refusing to set aside an umpire's award dated 22nd March, 1958. The award, was in respect of certain disputes between the company and the Union of India in the matter of disposals of the United States surplus war materials left by the Government of the U S A at the end of the last World War. These surplus materials called the U S Surplus Stores, consisted of vehicles and other stores. It was said that these were sold to the company by the Director General Disposals through correspondence and sale notes. These contracts of sale were subject to the General Conditions of Contract (Form Con 117) Cl 13 of these General Conditions provided that

"In the event of any question or dispute arising under these conditions or any special conditions of contract or in connection with this contract—the same shall be referred to the award of an arbitrator to be nominated by the Director General and an arbitrator to be nominated by the contractor, or in the case of the said arbitrators not agreeing then, to the award of an umpire to be appointed by the arbitrators in writing before proceeding on the reference.

Upon every and any such reference, the assessment of the costs incidental to the reference and award respectively shall be in the discretion of the arbitrators or in the event of their not agreeing, of the umpire appointed by them.

2 Disputes having arisen between the parties both as regards the contents and the quantity of the vehicles delivered under the contracts they were referred, in the first instance, to two arbitrators nominated by the parties and ultimately to an umpire. The disputes were crystallized into nine claims by the appellant-company totalling Rs 6,73,34,500 and several counter-claims by the Government of India. At the end of the arbitration, the umpire, by his said award, disallowed all the claims made by the

company, except one for which he awarded Rs. 6,94,000 and held, in respect of the counter-claims filed by the Government of India, that the appellant-company was liable to pay to the Government in all Rs. 36,23,682.50 P. and costs amounting to Rs. 5,40,544. In the result, after deducting the claim allowed to the appellant-company, the company was held liable to pay to the Government Rs. 34,70,226.50P.

3. The award having been filed by the umpire in the Court of the District Judge, Delhi and the Government of India having thereupon applied for a decree in terms of the award, the company applied to the Court for setting aside the award urging several grounds for so doing. The District Judge by an elaborate judgment declined to set aside the award. He, however, held that the award suffered from an error apparent on the face of the award in respect of the appellant's claim No. III (a), and further held that the counter-claims II, IV, V and VI made by the Government were not covered by the reference, and consequently, the umpire had no jurisdiction to go into them. Declining, however, to set aside the award, he remitted it for reconsideration of the aforesaid items and also for readjustment of the amount of costs in the event of enhanced compensation being awarded to the company in respect of its claim No. III (a). Dissatisfied with the judgment of the appellate Court, the company filed an appeal before the High Court. The Union of India also filed certain cross-objections. The High Court heard the appeal and the cross-objections together and by its aforesaid judgment dismissed both the appeals and the cross-objections and upheld the judgment of the District Judge.

4. In support of the claim that the award was liable to be set aside, Counsel for the company submitted the following six propositions for our acceptance:

1. that the contracts of sale entered into by the company were misconstrued by the umpire and such misconstruction appears on the face of the award;

2 that the umpire, as also the High Court, failed to take into considera-

tion several documents while deciding the scope of the sales;

3. that in respect of claim No. VI and counter-claim No. VI of the Government, the umpire acted beyond his jurisdiction as those questions did not fall within the scope of the reference,

4. that the umpire did not act according to law but acted as a conciliator and based his award on mere conjectures and surmises,

5. that his conclusion on ground rent awarded to the Government was based on no evidence; and

6. that the costs awarded to the Government were altogether disproportionate.

5. Before we proceed to consider these propositions, it is necessary to ascertain the scope of section 30 of the Arbitration Act, 1940 and the principles underlying that section. The general rule in matters of arbitration awards is that where parties have agreed upon an arbitrator, thereby displacing a Court of law for a domestic forum, they must accept the award as final for good or ill. In such cases the discretion of the Court either for remission or for setting aside the award will not be readily exercised and will be strictly confined to the specific grounds set out in sections 16 and 30 of the Act. In *Hodgkinson v. Ferne*¹, Williams, J., stated the principle as follows :—

“Where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and fact—The only exceptions to that rule are, cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award.”

This observation was recently cited with approval in *Union of India v. Bungo Steel Furniture Pvt. Ltd.*²

1. (1857) 3 C B (N S) 189 at 202.

2. (1967) 2 S.C.J. 440 : (1967) 1 S.C.R. 324.

6 The principle is that the Court, while examining an award, will look at documents accompanying and forming part of the award. Thus, if an arbitrator were to refer to the pleadings of the parties so as to incorporate them into the award, the Court can look at them. In some cases, however, Courts extended the principle and set aside the award on a finding that the contract though only referred to but not incorporated into the award as part of it, had been misconstrued and such misconception had been the basis of the award. Thus in *Lanlauer v Asser*¹ the dispute between buyers and sellers of goods was as to who was entitled to certain sums paid upon a policy of insurance upon the goods. This was referred to arbitration and the umpire made his award basing it on the construction he placed on the contract, namely that as the parties to the contract were 'by the terms thereof principals, their interest and liability in insurance was defined to be the value of the invoice plus 5 per cent. On an application to set aside the award, the Court of Appeal held that inasmuch as the umpire had referred to the contract and the terms thereof, it was justified in looking at the contract and having done so, found that he had based his decision entirely upon the terms of the contract. It also found that since the contract, if properly construed did not justify the decision, the award was bad on the face of it and was liable to be set aside. A similar view appears also to have been taken in *FR Absalom Ltd v Great Western (London) Garden Village Society Ltd*². Where the award set out the relevant words and clause 30 of the contract and also the conclusion of law on the meaning of those words Lord Russell said that since the award recited the contract and referred in terms to the provisions of clause 30, thereby incorporating it into the award, and then stated the construction which the arbitrator placed upon that clause, the Court was entitled to look at that clause to ascertain if the construction placed by the arbitrator was erroneous.

the Privy Council in *Champsey Bhara & Co v Jitray Balloo Spinning & Weaving Co Ltd*³. Lord Dunedin, however, did not expressly overrule it but rested content by observing that that decision was not binding on the Board. But he formulated the principle thus:

"An error in law on the face of the award means,—that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound."

The Privy Council upheld the award stating that it was impossible to say what was the mistake on the face of the award which the arbitrators had made as they had not tied themselves down to any legal principle which was unsound. The mere fact that the Court would have construed a document differently than the arbitrator would not induce the Court to interfere unless the construction given by the arbitrator is such that it is against the well established principles of construction (see *Kalanton v Duff Development Co*⁴).

8 In an illuminating analysis of a large number of earlier decisions, including *Lanlauer*⁵ and *FR Absalom Ltd*⁶ Diplock, L.J., in *Giacomo Costa Fu Ardeia v British Italian Trading Co Ltd*⁷ recorded his conclusion thus:

"It seems to me therefore, that on the cases, there is none which compels us to hold that a mere reference to the contract in the award entitles us to look at the contract. It may be that in particular cases a specific reference to a particular clause of a contract may incorporate the contract or that clause

7 The correctness of the decision in *Lanlauer v Asser*¹, was challenged before

1 L.R. (1905) 2 K.B. 184

2 L.R. (1933) A.C. 592

1 L.R. (1923) A.C. 480

2 L.R. (1923) A.C. 395

3 L.R. (1905) 2 K.B. 184

4 L.R. (1933) A.C. 592

5 (1962) 2 All E.R. 53 at 62

of it, in the award. I think that we are driven back to first principles in this matter, namely, that an award can only be set aside for error which is on its face. It is true that an award can incorporate another document so as to entitle one to read that document as part of the award and, by reading them together, find an error on the face of the award."

The question whether a contract or a clause of it is incorporated in the award is a question of construction of the award. The test is, does the arbitrator come to a finding on the wording of the contract. If he does, he can be said to have impliedly incorporated the contract or a clause in it whichever be the case. But a mere general reference to the contract in the award is not to be held as incorporating it. The principle of reading contracts or other documents into the award is not to be encouraged or extended [see *Babu Ram v. Nanhemal and others.*¹]

The rule thus is that as the parties chose their own arbitrator to be the Judge in the dispute between them, they cannot, when the award is good on the face of it, object to the decision either upon the law or the facts. Therefore, even when an arbitrator commits a mistake either in law or in fact in determining the matter referred to him, but such mistake does not appear on the face of the award or in a document appended to or incorporated in it so as to form part of it, the award will neither be remitted nor set aside notwithstanding the mistake.

9. In the light of the principle above stated, the first question calling for determination is, is there an error apparent on the award, in the sense that the umpire misconstrued the contracts of sale inasmuch as though those contracts were contained in sale-notes as well as in several letters, he considered the sale-notes only as containing the contracts of sale disregarding the correspondence which had taken place between the company and the Director-General, Disposals and his officers? Such a question would undoubtedly be one of law. But the disputes referred to the umpire contained disputes both of fact and law. Ordinarily the decision of the umpire, even though it be on a question of law, would be

binding on the parties. The Court would only interfere if the case falls within the exceptions mentioned by Williams, J., in *Hodgkinson v. Feme*¹ and reaffirmed by Diplock, L.J., in *Giacomo Costa Fu Andrea v. British Italian Trading Co., Ltd.*².

10. There were in all three separate sales to the appellant-company, which according to the respondents were incorporated in sale-notes Nos. 160, 161 and 197. Before the sale-note 160 was issued on 11th July, 1946, it is a fact that the company had written a letter dated 10th July, 1946, which was also endorsed by two officers of the Director-General, Disposals. The letter contained three clauses, the first of which stated that "M/s Allen Berry will buy the Moran Vehicles Depot 'as is where is' for Rs. 1,80,00,000". The two other clauses provided the manner and time of payment of the sale price. But the letter commenced with the following words :

"Pending detailed record of terms tomorrow the following are the broad heads of agreement, which will form the basis of sale of surplus vehicles":

The next day, i.e., 11th July, 1946, the Department issued sale-note 160 which in clear terms stated that what was purchased were "all vehicles and trailers lying in Moran Depot", which meant that the vehicles sold were only those that were actually lying in that depot on 11th July, 1946, and not those outside it or those borne on the records of that depot, as contended by the company. It, however, appears from the judgment of the Trial Court (para. 206) that on receipt of sale-note 160, the company wrote a letter on 11th July, 1946, in which it contended that "We have purchased the entire vehicle depot of Moran". It appears that in view of this difference of opinion, a meeting of representatives of the parties was held on 23rd July, 1946, the minutes of which, as recorded by the Assam Controller, U.S.A.S.S., read as follows.

"(2) (a) The vehicles and trailers sold to Messrs. Allen Berry & Co. Ltd., are deemed to include all vehicles

¹ C.A. No. 107 of 1966, decided on 5th December, 1968.

1. (1857) 3 C.B. (N.S.) 189 at 202.
2. (1962) 2 All E.R. 53 at 62.

which were or should have been held in Moran Depot on the 10th July, also those which have been issued on a Memorandum Receipt as follows —

(i) To the Americans, left behind by them in various camps and depots and not yet turned in by us

(ii) Vehicles issued on Memorandum Receipt to military units assisting the U S A S S, Organisation

(iii) Any surplus vehicles originally allotted to U S A S S Units—for operational purposes and now no longer required by them

On 17th September 1946, as seecraphone message was sent from New Delhi to Calcutta which stated We have sold U S Army surplus vehicles presumed to be borne on Moran list, that is those actually in Moran Vehicle Depot or those that were intended to be moved to that depot, which was meant to be parking depot for surplus U S vehicles in Assam area. On 26th September, 1946, the Director General Disposals, wrote to the company that The vehicles sold to you in Assam are those U S Army surplus vehicles actually in Moran Vehicles Depot or those that were intended to be moved to Moran Vehicle Depot. Any mobile engineering equipment such as mobile cranes, tracked tractors are excluded from the sale to you. On 10th December, 1946, the Controller issued a release order in respect of

1 All vehicles and trailers lying in Moran Depot on 10th July, 1946, including all United States Army Surplus Stores excluding land and buildings, lying within Moran Depot and transferred to the Government of India from the Government of the United States

2 Vehicles in operational use in Calcutta and Assam as and when no longer required by the U S A S S Organisation'

11 The question raised by Counsel is that the umpire failed to consider all these documents while considering the scope and content of the contract of sale and relied on only sale note No 160, dated 11th July, 1946, that the contract was not contained in the said note 160

alone, and that therefore he misconstrued the contract, and that that misconstruction, which is a point of law, is apparent on the face of the award, as it was made the very basis of the award

12 The first three issues raised by the umpire were

(1) whether the appellant was entitled to prove that any vehicles, stores etc., other than those mentioned in the sale notes were sold to it,

(2) whether the Government was bound by the clarifications, representations, explanations or assurances made or given by any officer or officers of the Department regarding the subject matter of the contracts of sale except those necessarily implicit in the sale notes, and

(3) whether the Government sold any vehicles except those lying in Moran Depot on 11th July 1946, or those intended to be moved thereto

13 The dispute between the parties, thus, clearly was that whereas the company claimed that the sale was of all vehicles borne on the records of Moran Depot irrespective of whether they were actually lying there on 11th July 1946 or not, the Government claimed that the company was entitled to those actually lying in the Depot. According to the respondents the contract of sale was to be found in the sale note, and therefore, any subsequent explanations or assurances given by any officer or officers of the Department could not vary or alter the terms of the contract. These explanations and assurances were given only to remove the misunderstanding of the company over the question of the scope and extent of the sale made to it

14 The umpire set out part of the sale-notes 160 and 197 in the award and then observed

"the language used in these sale letters is to my mind perfectly clear, explicit and unambiguous and excludes the possibility of any vehicles trailers or stores lying on the dates in question outside the locations specified in the sale letters having been included in the two sales. The contention that they in fact include all vehicular stores in Assam in one case and in Bengal area

in the other has been made in all seriousness and a good deal of evidence both oral and documentary has been produced in support of or against such contention. The point has also been argued at great length by learned Counsel for the parties. I have given the whole matter my most serious and earnest consideration and my view is that apart from the language of the two sale-deeds being against such a contention, the evidence too considered as a whole does not support it. Accordingly, I hold that the stores sold to the claimants in the case of Assam were those actually located in Moran Depot on 10th July, 1946 and in the case of Bengal those actually located in Jodhpur and other depots specified in the sale letter on 31st July, 1946".

He next held:

"The alleged clarifications or representations made or explanations or assurances given by any officer or officers of the disposals department either verbally or in writing have been very carefully examined by me and I am of opinion that neither are they, considered as a whole, capable of the interpretation sought to be put upon them by the claimants nor are the respondents bound by them. They are not in accordance with law and do not amount to legal contracts binding the respondents".

These passages clearly show that the umpire had considered, besides the sale-notes, the oral and documentary evidence led by the parties as also the contentions urged on and as regards them by Counsel for the company. It is impossible, therefore, to uphold the contention that the various documents, *i.e.*, the letter of the company dated 10th July, 1946, the subsequent correspondence, minutes of the meetings which took place after the sale-note 160 was issued etc., were not taken into consideration by the umpire while coming to his conclusion as to what actually was sold to the company.

15. The dispute, amongst other disputes, referred to the umpire and crystallized by him in the form of issues on the pleadings of the parties involved, as already stated, the question first as to what was

sold, and secondly, arising out of that, the question whether besides the said sale-notes 160 and 197, the subsequent clarification or explanations were binding on the Government. These were, no doubt, questions partly of fact and partly of law. But questions both of fact and law were referred to the umpire and *prima facie* his findings on them would bind the parties unless, as explained earlier the umpire has laid down any legal proposition, such as a construction which is made the basis of the award and is on the face of the award an error.

16. The point is, is this such a case? True it is that this is not a case where a question of law is specifically referred to. It is clearly a case falling in the category of cases, like *Kalanton v. Duff Development Co., Ltd.*¹, wherein deciding the questions referred to him the umpire has to decide a point of law. In doing so, the umpire, no doubt, laid down the legal proposition that the clarifications or assurances given subsequent to the dates of the said sale-notes by an officer or officers of the department were not binding on the respondents nor could they affect the scope of the sales. That answer the umpire was entitled to give. But the fact that he answered a legal point does not mean that he has incorporated into the award or made part of the award a document or documents, the construction of which, right or wrong, is the basis of the award. The error, if any, in such a case cannot be said to be an error apparent on the face of the award entitling the Court to consider the various documents placed in evidence before the umpire but not incorporated in the award so as to form part of it and then to make a search if they have been misconstrued by him. This, in our understanding, is the correct principle emerging from the decisions which Counsel placed before us. In any event, this is not a case where the umpire, in the words of Lord Dunedin, "tied himself down to a legal proposition" which on the face of the award was unsound. The award makes it clear in so many words that he took into account the entire evidence, including the documents relied on by Counsel and then only came to the conclusion that it did not assist the company in its contention as to the scope of the sales. Contentions

1. L.R. (1923) A.C. 395

1 and 2 raised by Mr Agarwal, therefore, cannot be upheld

17 Contention No 3 relates to 547 vehicles said to have been sold to the company under sale note 197, dated 2/6th August 1946. There is no dispute that out of these vehicles the company removed 291 vehicles alleging that the delivery of the balance of 256 vehicles was withheld. The company made a claim being No VI for the price of these 256 undelivered vehicles. The respondents' contention was that the sale to the company was confined only to the U S A Surplus Stores, that these vehicles did not fall within that category but were Reverse Land Lease vehicles belonging to the Government of India under an agreement between the U S A and India. On these allegations the respondents laid counter-claim No VI claiming the price of the 291 vehicles admittedly removed by the company when they were lying in Jodhpur Depot, Calcutta.

18 The umpire found that the expression 'Reverse Land Lease' related to the reciprocal aid articles referred to in the said agreement. A reciprocal aid article, according to that agreement, meant an article transferred by the India Government to the U S Government under reciprocal aid under para 4 C of that agreement. The U S A Government was deemed to have acquired as on 2nd September 1945 full title over such articles except that such reciprocal aid articles incorporated into installations in India were deemed to have been returned to India Government from the date when the U S A forces relinquished possession of such installations. From the inventories produced before him the umpire held that these 547 vehicles were incorporated into installations in India, and therefore ownership in them vested in India Government on and after the U S A forces relinquished possession of those installations. They could not, therefore be regarded as U S Surplus Stores which alone were and could be the subject matter of sale note 197. Consequently the company was not entitled to remove the said 291 vehicles which it did much less could the company claim compensation for 256 vehicles which it alleged were not delivered to it. In the result, the umpire allowed the Govern-

ment's counter-claim No VI, which was for the price of 291 vehicles unauthorisedly removed by the company from Jodhpur Depot.

19 The argument in connection with this part of the award was, firstly, that the findings of the umpire were vitiated as there was total lack of evidence on which they could be based, and secondly that in any event, the umpire had no jurisdiction to award compensation to the Government in respect of counter claim No VI. The first part of the argument need not detain us as the finding that those vehicles formed part of reciprocal aid articles, the ownership in which vested in the Government of India and were therefore not U S A S S was based on the agreement between the two Governments and the inventories produced before the umpire from which he could hold that they belonged to the Government of India from the date when the installations in which they were incorporated were relinquished by the U S forces, and that therefore, they could not form the subject matter of sale note 197 which related only to the U S Surplus Stores.

20 The second part of the argument, however, requires consideration. The question is whether the arbitration clause included a dispute relating to compensation in respect of the said 291 vehicles unauthorisedly removed by the company. clause 13 of the general conditions of contract quoted earlier, provides for reference to arbitration of all questions or disputes "arising under these conditions" or "in connection with this contract".

21 Dr Singhvi referred us to clause 10 of these conditions also but it is clear that it can in no sense apply to the dispute relating to compensation. But the words "arising under these conditions" and "in connection with this contract" are undoubtedly wide and comprehensive. It is nonetheless a question whether the dispute as to compensation on the ground of unauthorised appropriation of these vehicles by the company falls within clause 13. In *Vidya Sagar Joshi v Surinder Nath Gauram*¹ the words "expenditure in con-

nection with election" used in section 77 of the Representation of the People Act, 1951, were construed to mean "having to do with". An arbitration clause wherein the words "in relation to or in connection with the contract" were construed not to contemplate a dispute raised by a contractor that he could avoid the contract on the ground that it was obtained by a fraudulent misrepresentation. (see *Monro v. Bognor Urban District Council*)¹. But a claim for damages on the ground of negligence on the part of the defendant in removing the plaintiff's furniture against a clause for due diligence in removing it was held to fall within the arbitration clause. (*Woolf v. Collis Removal Service*)².

22. Counsel conceded that a dispute as to the interpretation of sale-note 197 would fall under the arbitration clause. If that is so, it must follow that the umpire was competent to decide whether the said 547 vehicles fell within the purview of the sale-note or not. If in determining that question he came to the conclusion that they did not, the obvious conclusion would be that the company was not entitled to take away 291 vehicles admittedly removed by it from the depot. If the company did that, would the question as to the return or of compensation in lieu of such vehicles to which it was not entitled under the sale, be a question which arises out of or in connection with the contract? Counsel went as far as to say that the umpire in deciding the company's claim No. VI and the Government's counter-claim No. VI could decide that the company was not entitled to those vehicles, but could not take the next step either to direct the return of them or payment of compensation in lieu of those vehicles. In our view, such an argument cannot be accepted. The reason is that once it is found that he was competent to decide the dispute as to whether the said 547 vehicles were not the subject-matter of the sale and 291 of them were removed unauthorisedly, he must, to do justice between the parties in respect of disputes referred to him, order the company either to return them or to pay compensation for them. Since the first course was not possible after all

these years, the second was the only and the obvious course. The dispute raised by the respondents that 291 vehicles were not included in the sale was co-extensive with and connected with the dispute that the company was bound to return them if it was found that they were not covered by the sale. On this reasoning it is not possible to say that the umpire went beyond his jurisdiction either in rejecting the company's claim No. VI or in accepting the corresponding counter-claim No. VI of the respondents.

23. Contention 4 relates to 600 vehicles which had been taken out of Moran Depot for operational purposes, but which the company claimed were part of the sale under sale-note 160. The umpire held (1) that these vehicles having been taken out of the depot for operational purposes did not fall within the sale, and (2) in the alternative, that the evidence disclosed that a substantial number of vehicles in operational use were delivered to the company even though strictly speaking it was not entitled to them as they were not lying in the depot on 10th July, 1946. The umpire further held that if some of them per chance were not handed over, the respondents had sufficiently compensated the company by handing over several non-operational vehicles from outside the depot to which the company was not entitled. Counsel argued that this part of the award was vague and without any evidence to support it, and therefore, the umpire behaved in this respect more like a conciliator than as an arbitrator.

24. Having held that sale-note 160 covered only those vehicles which were actually lying in Moran Depot on 10th July, 1946, it was not incumbent on the umpire to decide the number of operational vehicles outside the depot. Consequently, if he was satisfied that even though the company was not entitled to the said 600 vehicles claimed by it yet the authorities had delivered a substantial number of them, and for any deficiency, had also delivered non-operational vehicles, there would be no purpose in going into the details of vehicles delivered to the company. Even though, as the judgment of the trial Court discloses (para 223), there was evidence, both oral and documentary, that the company had

1. L.R. (1915) 3 K.B. 167.

2. (1947) 2 All E.R. 260.

collected a number of vehicles lying at places outside the depot and the vehicles so collected were recorded by the company yet the company had withheld the production of those records. In view of these facts it is impossible to say that the umpire had acted without evidence, or that he behaved in the manner of a conciliator or gave findings on conjectures and surmises.

25 Our interference was invited next on the question of ground rent on the ground that the amount of such rent was fixed by the umpire without any evidence. There is hardly any substance in this contention. The sites on which the various depots were situated were requisitioned by the Government under the Defence of India Rules. The Government had a statutory obligation therefore to pay to the owners of those sites compensation as provided by those rules. Under the contracts of sale the company was bound to pay to the Government ground rent and other charges which the Government in its turn was liable to pay. It is therefore not correct to say that the umpire could award only that amount which the Government had actually paid and that the umpire should, therefore, have taken an account from the Government. It was never the case of the company that the Government had claimed ground rent higher than the compensation it was liable to pay.

26 The last objection was that the amount of costs awarded by the umpire to the respondents was disproportionate. It appears from the award that the umpire fixed the amount of costs after considering the statements of expenses incurred by the parties for the hearing before him tendered by the respective Counsel for the parties. Considering the huge amounts claimed by the parties the volume of evidence both oral and documentary, adduced by them the number of days occupied in recording that evidence and in arguing the case we are not prepared to say that the discretion which the umpire exercised in the matter of costs was exercised in breach of any legal provision or unreasonably which can justify the Court's intervention.

27 In our view none of the six contentions urged by Counsel can be upheld.

The result is that the appeal fails and is dismissed with costs.

S V J ——— Appeal dismissed

THE SUPREME COURT OF INDIA (Civil Appellate Jurisdiction)

PRESENT—S M Sikri and V Bhargava, JJ

Hathi Appellant*

v

Sunder Singh Respondent

Delhi Land Reforms Act (VIII of 1971) section 183, section 84 First Schedule and section 186—Civil Procedure Code section 9—Suit for declaration of Bhumidari rights and recovery of possession—Proper forum—Bar of civil Court's jurisdiction

The Act envisages only three classes of persons who would possess rights in Agricultural land after the commencement of the Act, viz., Bhumidar, Asami or Gaon Sabha. In view of the scheme of the Act under section 84 the right to institute a suit for possession was granted only to these 3 classes [Para 3]

Jurisdiction of the civil Court is clearly barred by section 185 of the Act read with the various items of the first schedule. If a Bhumidar seeks a declaration of his right, he has to approach the Revenue Assistant by an application under item 4, while, if a Gaon Sabha wants a classification in respect of any person claiming to be entitled to any right in any land it can institute a suit for a declaration under item 26 and the Revenue Assistant can make a declaration of the right of such person. So far as suits for possession are concerned jurisdiction is given to the Revenue Assistant to grant decree for possession and the suit for possession in respect of agricultural land, after the commencement of the Act, can only be instituted either by a Bhumidar, or an Asami or the Gaon Sabha. There can be no suit by any person claiming to be a proprietor, because the Act does not envisage a proprietor or as such continuing to have right after the commencement of the Act. The jurisdiction of the civil Court is limited to deciding the title referred to it by the revenue Court. This clearly implies that if a question of title is raised in an applica-

ion for declaration of Bhumidar's right under item 4 of Schedule I of the Act, that question will then be referred by the Revenue Assistant to the civil Court; but a party wanting to raise such a question of title in order to claim Bhumidari right cannot directly approach the civil Court.

All the reliefs claimed by the appellant in the instant suit were within the competent jurisdiction of the Revenue Assistant and the civil Court has no jurisdiction to entertain the suit. [*Para. 7*].

Appeal by Special Leave from the Judgment and Decree dated the 2nd December, 1965 of the Punjab High Court, Circuit Bench at Delhi in Letters Patent Appeal No. 67-D of 1965.

C.B. Agarwala, Senior Advocate (*P.P. Juneja*, Advocate with him), for Appellant.

Sardari Lal Bhatia, D.R. Gupta and H.K. Puri, Advocates, for Respondent.

The Judgment of the Court was delivered by

Bhargava, J.—The appellant Hatti, was declared a Bhumidar of some land belonging to the respondent Sunder Singh, under section 13 of the Delhi Land Reforms Act No. VIII of 1954 (hereinafter referred to as "the Act"). The respondent then brought a suit in the civil Court claiming three reliefs. The first relief claimed was for a declaration that the declaration of Bhumidari issued in the name of the appellant with respect to the land in dispute was wrong, illegal, without jurisdiction, *ultra vires*, void and ineffective against the respondent. The second relief was that the respondent be declared entitled to Bhumidari rights under section 11 of the Act; and the third relief was for possession of the land. The suit was brought on the allegation that the respondent was the owner of the land, while the appellant had no rights in it. The land along with some other land was on Mustrajri with one Sultan Singh for a period of 20 years ending in June, 1952 and the appellant had been admitted as a tenant-at-will by the Mustrajar. On the expiry of the period of 20 years in June, 1952, the Mustrajri stood terminated and the original Mustrajar's heirs left the land. The appellant, however, continued in possession, but, since he was a tenant-at-will of the Mustrajar, he had no rights in the land after the expiry

of the Mustrajri. He was asked to surrender possession, but failed to do so. On the other hand, he was wrongly granted the declaration under section 13 of the Act that he was a Bhumidar when he had no rights as tenant in the land at all. The main defence taken on behalf of the appellant was that he was a non-occupancy tenant and he was entitled to the declaration of his Bhumidari rights. Apart from the issues on merits, one issue was raised by the appellant that the civil Court had no jurisdiction to entertain the suit in view of the provisions of section 185 of the Act. The trial Court held that the jurisdiction of the civil Court was not barred. On merits, the finding recorded was that the respondent was the proprietor of the land, but no declaration could be granted that he became Bhumidar under section 11 of the Act, as that relief could only be granted by the revenue authorities under the Act. It was held that he was, however, entitled to possession in exercise of his right as proprietor so that a decree for possession was granted in his favour. That decree was upheld, in appeal, by the District Judge and, in Second Appeal, by a learned single Judge of the High Court of Punjab. The Letters Patent appeal before the Division Bench was also dismissed, so that the appellant has now come up to this Court in this appeal by Special Leave.

2. The only point that was argued before the Division Bench in the Letters Patent appeal was that the civil Court had no jurisdiction to entertain the suit, so that in this appeal, we are also concerned with this issue alone. Section 185 (1) of the Act, on which reliance has been placed for urging that the civil Court has no jurisdiction, is as follows:—

"185. (1) Except as provided by or under this Act, no Court other than a Court mentioned in column 7 of Schedule I shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, take cognizance of any suit, application, or proceedings mentioned in column 3 thereof."

The relevant entries in the First Schedule, which require consideration, are numbers 4, 19 and 28. Item 4 mentions applications for declaration of Bhumidari rights in column 3 and *inter alia*, refers to sections 11 and 13 of the Act. For these

applications, there is no period of limitation prescribed at all, and the Court of original jurisdiction is that of the Revenue Assistant. Item 19 refers to section 84 of the Act and relates to suit for ejectment of a person occupying land without title and for damages. The three sub clauses mention that the suit can be instituted (i) by a Bhumidar declared under Chapter III of the Act or by an Asami falling under section 6 of the Act where such unlawful occupant was in possession of the land before the issue of the prescribed declaration from (ii) by a Gaon Sabha where the unlawful occupant was in possession of the land before the constitution of Gaon Panchayat, and (iii) by a Bhumidar, Asami or Gaon Sabha in any other case. The period of limitation is three years, in the first case, from the date of issue of the prescribed declaration form, in the second case, from the date of constitution of Gaon Panchayat under section 151, and in the third case from the 1st of July following the date of occupation. The Court of original jurisdiction in each case is that of the Revenue Assistant. Item 28 refers to section 104 and relates to declaratory suit, under that section. No period of limitation is prescribed for such a suit, and the Court of original jurisdiction is again the Revenue Assistant. The plea put forward on behalf of the appellant was that this suit, which was instituted by the respondent, covered only those reliefs which could be granted by the Revenue Assistant under the three items Nos. 4, 19 and 28 of the First Schedule to the Act mentioned above, so that, by virtue of section 183 of the Act the jurisdiction of the civil Court was barred. The High Court has taken the view that the suit is really in the nature of a title suit and such a title suit is not covered by these items, so that the jurisdiction of the civil Court was not barred. It is this view of the High Court that has been challenged before us in this appeal.

3. Learned Counsel appearing for the appellant took us through the various provisions of the Act to show that the Act is a complete code which lays down the rights that any person can possess in agricultural land in the area to which the Act applies and the remedies that can be sought in respect of such land for obtaining declaration of their rights or

any other declaration for possession. The Act abolished the ownership of agricultural land by the previous proprietors. This was effected by first laying down in sections 11 and 13 that proprietors will become Bhumidars in respect of their lands which were their *khud kasht* or *Sir* while tenants would become Bhumidars in respect of their holdings. Under section 6 of the Act, persons belonging to several classes which included non occupancy tenants of proprietor's grove and sub tenants of tenant's grove, and non occupancy tenants of pasture land, or of land covered by water, and some other classes shall become Asamis. "Holding" was defined in section 3 (11a) of the Act by stating that it means —

(a) in respect of—

(i) Bhumidar or Asami, or

(ii) tenant or sub tenant under the Punjab Tenancy Act, 1887, or the Agra Tenancy Act, 1901, or

(iii) lessee under the Bhoodan Yagna Act 1955 a parcel or parcels of Land held under one tenure, lease, engagement or grant, and

(b) in respect of proprietors, a parcel or parcels of land held as *sir* or *khud-kasht*.

The effect of sections 6 and 13 was that, the earlier, tenants and sub tenants are lesses under the Bhoodan Yagna Act 1955 ceased to continue as such and either became Bhumidars or Asamis in respect of their holdings. Similarly, under section 11 proprietors in respect of their *sir* and *khudu kasht* land became Bhumidars. These sections have to be read in conjunction with section 154 of the Act of which the relevant portion is quoted below —

151. On the commencement of this Act—

(i) all lands whether cultivable or otherwise except land for the time being comprised in any holding or grove

* * * * *

situate in a Gaon Sabha Area, shall vest in the Gaon Sabha

* * * * *

sections 6, 11, 13 and 154 of the Act read together, thus, show that, after the Act came into force, proprietors of agricultural land as such ceased to exist. If any land was part of a holding of a proprietor, he became a Bhumidar of it. If it was part of a holding of some other person, such as a tenant or a sub-tenant etc., he became either a Bhumidar or an Asami, whereupon the rights of the proprietor in that land ceased. Lands, which were not holdings of either the proprietor or any other person, vested in the Gaon Sabha. In the case of proprietors, their rights in the land continued to exist only in respect of holdings which, under the definition, must have been either their *sir* or *khud kasht* at the commencement of the Act. If it was not *sir* or *khud kasht* of a proprietor, it would not be his holding and, consequently, such land would vest in the Gaon Sabha under section 154, the result of which would be that the rights of the proprietor would be extinguished. It appears that it was in view of this scheme of the Act that, under section 84, the right to institute a suit for possession was granted only to a Bhumidar, or an Asami, or the Gaon Sabha. The Act envisaged only these three classes of persons who would possess rights in agricultural land after the commencement of the Act. Proprietors as such having ceased to exist could not, therefore, institute a suit for possession. This aspect of the case has been lost sight by the High Court and the lower Courts, because it appears that their attention was not drawn to the provisions of section 154 of the Act, under which all lands of proprietors, other than those comprised in their holdings, vested in the Gaon Sabha, thus extinguishing their proprietary rights.

4 A second aspect that needs examination relates to the provisions of the Act for declaration of Bhumidari rights. Sections 11 and 13 grant powers to the Deputy Commissioner to declare proprietors in respect of their holdings and certain classes of tenants in respect of their holdings as Bhumidars. The procedure to be adopted for issuing the declaration forms was laid down in the Delhi Land Reforms Rules, 1954 (hereinafter referred to as "the Rules") made by the Chief Commissioner of Delhi in exercise of the powers conferred by sections 9, 105, 149,

162, 180 and 191 of the Act. The relevant rules are 6 to 8. These rules envisaged preparation of declaration forms by the revenue authorities without any application from any party. The declaration forms are based on the entries in the revenue records and, having been prepared on their basis, the declaration forms are issued to the persons who, under the forms, are held to be entitled to be declared as Bhumidars. These rules, thus, do not envisage any application under section 11 or section 13 at this early stage. Rule 8 (4) lays down that anyone, who challenges the correctness of entries in the forms of declaration, shall, except where it refers to a clerical omission or error, be directed by the Revenue Assistant to file a regular suit within two months of the date of issue. Obviously, this sub-rule has to be interpreted in conformity with section 185 and item 4 of the First Schedule to the Act, so that the scope of this sub-rule must be confined to institution of suits in respect of matters not covered by item 4 of the First Schedule. This sub-rule would not stand in the way of an application being made by any person claiming to be Bhumidar under item 4 of the First Schedule.

5. The rules were examined by Khanna, J., in *Lal Singh v Sardara and another*¹, and, in our opinion, he rightly held that a perusal of the rules goes to show that there is no provision for giving notice to different interested parties before a declaration of Bhumidari rights is made and the whole thing is done in more or less a mechanical way. That being the position, it becomes obvious that an application for declaration of a Bhumidari right under item 4 of Schedule I of the Act is intended to be made even in cases where a declaration may have been previously granted under section 11 or section 13 in accordance with the rules. The scheme of the Act appears to be that, initially, a declaration of Bhumidari right can be granted under section 11 or section 13 without calling for objections and without hearing contesting parties in favour of the person who appears to the revenue authorities to be entitled to the declaration on the basis of the records maintained by them. Thereafter, any person aggrieved and claiming Bhumidari rights is expected to move an application

1. (1964) I L.R. 17 Punj. 428.

before the Revenue Assistant who is to adjudicate upon the rights after following the usual judicial procedure. The order made by the Revenue Assistant in such a proceeding will then have to be given effect to and would override the declarations earlier issued in accordance with the rules. This shows that any person, who is aggrieved by a declaration of Bhumidari right issued in favour of another person, can appropriately seek his remedy by moving an application before the Revenue Assistant under item 4 of the First Schedule, whereupon, if he succeeds, he will obtain a declaration that he is the Bhumidar. Such a declaration will automatically supersede the declaration issued by the authorities in accordance with the rules without any adjudication of rights and without notice to interested parties.

6 Khanna J, in the case of *Lal Singh v Sardars and another*¹, correctly interpreted the scope and purpose of the rules under which forms of declaration of Bhumidari rights are issued but, in our opinion, incorrectly inferred that, since there is no effectual adjudication of rights by the revenue authorities while declaring Bhumidari rights, their declaration must be subject to the due adjudication of rights which, in the absence of anything to the contrary, can only be by a civil Court. It is true that the declarations made by the revenue authorities without going through the judicial procedure are subject to due adjudication of rights but such adjudication must be by an application under item 4 of Schedule I and not by approach to the civil Court. The jurisdiction of the civil Court is clearly barred by section 18, of the Act read with the various items of the First Schedule mentioned above. If a Bhumidar seeks a declaration of his right, he has to approach the Revenue Assistant by an application under item 4 while, if a Gaon Sabha wants a clarification in respect of any person claiming to be entitled to any right in any land it can institute a suit for a declaration under item 28, and the Revenue Assistant can make a declaration of the right of such person. So far as suits for possession are concerned we have already held earlier that section 84 read with item 19 of the

First Schedule gives the jurisdiction to the Revenue Assistant to grant decree for possession, and that the suit for possession in respect of agricultural land, after the commencement of the Act, can only be instituted either by a Bhumidar or an Asami or the Gaon Sabha. There can be no suit by any person claiming to be a proprietor because the Act does not envisage a proprietor as such continuing to have rights after the commencement of the Act. The First Schedule and section 84 of the Act provide full remedy for suit for possession to persons who can hold rights in agricultural land under the Act.

7 The High Court, in this connection, referred to section 186 of the Act under which any question raised regarding the title of any party to the land, which is the subject matter of a suit or proceeding under the First Schedule, has to be referred by the Revenue Court to the competent civil Court for decision after framing an issue on that question. Inference was sought to be drawn from this provision that questions of title could be competently agitated by a suit in the civil Court as the jurisdiction of the civil Court was not barred. It appears to us that there is no justification for drawing such an inference. On the contrary, section 186 envisages that questions of title will arise before the revenue Courts in suits or proceedings under the First Schedule and only if such a question arises in a competent proceeding pending in a revenue Court, an issue will be framed and referred to the civil Court. Such a provision does not give jurisdiction to the civil Court to entertain the suit itself on a question of title. The jurisdiction of the civil Court is limited to deciding the issue of title referred to it by the revenue Court. This clearly implies that, if a question of title is raised in an application for declaration of Bhumidari rights under item 4 of Schedule I of the Act, that question will then be referred by the Revenue Assistant to the civil Court but a party wanting to raise such a question of title in order to claim Bhumidari right cannot directly approach the civil Court. The Act is a complete code under which it is clear that any one, wanting a declaration of his right as a Bhumidar, or aggrieved by a declaration issued without notice to him in favour of another, can approach the Revenue Assistant under item 4 of

industrial dispute under section 10 (i) of the Industrial Disputes Act, 1947

2 The reference arose from the following facts. Prior to 20th April 1959, the Government of Bihar was conducting through one of its departments, called the Rajya Transport Authority, an undertaking of road transport in the State. The said Authority appointed respondent 3 as a Head Clerk in the office of the Divisional Manager, Rajya Transport, Bhagalpur, as from 27th July, 1956. The order appointing him stated that the appointment was purely temporary and was terminable without notice and without assigning any reasons. By an order dated 18th February 1959 issued by the State Transport Commissioner, Rajya Transport, he was discharged from service with immediate effect. On 20th April, 1959, the State Government in exercise of the power conferred by section 3 of the Road Transport Corporations Act LXIV of 1950 set up as from 1st May, 1959, the appellant corporation. The notification issued under section 3 *inter alia* stated that "The said Corporation shall, with effect from the said date, exercise all the powers and perform all the functions which are at present being exercised and performed by the Rajya Transport, Bihar". In the meantime the question of the termination of services of respondent 3 was espoused by respondent 4 before the Assistant Labour Commissioner. The conciliation proceedings having failed, the State Government referred the dispute to the Labour Court by an order dated 24th February, 1961.

3 The Labour Court found (a) That respondent 3 was a workman within the definition of that term in the Industrial Disputes Act and the standing order governing the appellant-corporation, and that though appointed a head clerk, there was no evidence to show that his work as such head clerk was managerial or supervisory, (b) That the order dated 18th February, 1959 terminating the services of respondent 3 was not termination of service *simpliciter*, but was punitive in nature. The Labour Court relied on a letter dated 30th January 1960 addressed by the appellant corporation to the said conciliation officer that the services of respondent 3 had been terminated because "in the course of certain enquiries the Rajya Transport Department had found

that Shri Sheo Prasad Sinha had committed various irregularities of the various nature in the discharge of his duties'. The Labour Court held that the said alleged irregularities amounted to misconduct as defined by the said standing orders, and that therefore, the services of respondent 3 could not be terminated on the ground of those irregularities without holding a disciplinary enquiry and giving to respondent 3 therein an opportunity of being heard. No such enquiry having admittedly been held, the Labour Court held that the said order was not justified as it was not in *bona fide* exercise of the power to terminate the services of respondent 3. No evidence was led by the appellant corporation before the Labour Court either to prove the said irregularities or to establish that the said order was justified. The Labour Court consequently held that the said order being invalid, and therefore, inoperative, respondent 3 would be deemed to have continued to be in service. It further held that the appellant-corporation was the successor in title of the said Rajya Transport and having taken over the erstwhile employees of the Rajya Transport, respondent 3 was deemed to be continuing in service of the appellant corporation. On these findings, the Labour Court concluded that the said order of termination was invalid, that respondent 3 was deemed to have continued in the service of Rajya Transport and thereafter of the appellant-corporation, and on this basis directed the appellant-corporation to reinstate respondent 3 in its service and pay compensation for the period from February to September, 1959.

4 The appellant-corporation thereupon filed a writ petition in the High Court for quashing the said award. In support of the writ petition three questions were raised before the High Court. (1) That the services of respondent 3 were terminated before the appellant-corporation was set up and consequently the remedy of respondent 3 was against the State Government and not against the corporation. The Labour Court had, therefore, no jurisdiction to direct the corporation to reinstate him or to pay compensation. (2) That respondent 3 was engaged in clerical work and was therefore not a workman as defined by the Act, (3) That

the termination of the services of respondent 3 was in conformity with the terms of the contract of service, and there was, therefore, no question of the principles of natural justice being applicable to such termination. The High Court rejected all the three contentions, refused to quash the order of the Labour Court and dismissed the writ petition holding that the appellant-corporation had failed to establish that there was any error of law apparent on the face of the record.

5. Counsel for the appellant-corporation urged before us : (a) that the respondent was a temporary employee engaged as a head clerk and was, therefore, not a workman as defined by section 2 (s) of the Industrial Disputes Act, (b) that the order terminating his services was an order of termination *simpliciter* and the Labour Court was, therefore, not entitled to interfere with or set aside such an order, and (c) that the order having been passed by the Rajya Transport Authority long before the corporation came into being, even assuming that the said order was illegal, the remedy of respondent 3 was against the State Government and not against the corporation.

6. There can be no doubt that the Rajya Transport Authority, prior to the setting up of the appellant-corporation, was carrying on the undertaking of transport and had standing orders regulating the conditions of service of its employees. The Rajya Transport, having been sanctioned by the Government on a temporary basis, as is apparent from standing order 3, its employees fell into two categories, namely, temporary and casual. Standing order 2 (d) defined an "employee" to mean any person employed by the Rajya Transport Authority to do any skilled or unskilled, manual or clerical labour on hire or for reward. There can be no doubt that respondent 3 was an employee of the Rajya Transport Authority. Standing Order 1, however, provides that the said standing orders were to apply only to workmen of the Rajya Transport other than officers and office staff employed in the administrative offices and sections. The order appointing respondent 3 shows that he was posted at the office of the Divisional Manager at Bhagalpur. *Prima facie*, respondent 3 was neither an officer nor a

member of the office staff in the administrative offices or sections. The standing orders, therefore, were applicable to him. No evidence was led by the corporation that respondent 3, as a head clerk, was concerned with or doing managerial or supervisory duties. The definition of a 'workman' in section 2 (s) of the Industrial Dispute Act being a comprehensive one, respondent 3 must be held to be a workman within the meaning of section 2 (s), whose conditions of service were governed by the said standing orders. Standing order 17 deals with the power of termination of employment of the Rajya Transport Authority. That standing order provides that the Authority has under the terms of employment the right to terminate the services of an employee with 15 days' notice or payment of 15 days' wages in lieu of such notice subject to the provisions of the Industrial Disputes (Amendment) Act, 1953. It further provides that the employment of such employees as are found guilty of misconduct may be terminated in accordance with the provisions of the relevant standing orders. The relevant standing order is standing order 18 which lays down certain acts or omissions as amounting to misconduct. Clauses (j) and (l) thereof lay down that habitual or gross neglect of work or habitual or gross negligence or neglect of duty resulting in loss to the Rajya Transport would be misconduct. But the standing orders do not provide any procedure for dealing with an employee guilty of such misconduct. It is well established that if the Rajya Transport Authority were to terminate the services of an employee on the ground of any misconduct enumerated in standing order 18, it could do so only in conformity with the principles of natural justice. The Authority in such a case would have, therefore, to furnish to the concerned employee charges alleged against him and would have to afford to him an opportunity to be heard. The letter of the General Manager of the appellant-corporation dated 30th January, 1960, earlier referred to makes it clear that the reason for terminating the services of respondent 3 was that he had been found to have committed irregularities of a serious nature in the discharge of his duties. That being so, the termination of services of respondent 3 was on account of

the aforesaid irregularities in the discharge of his duties and *prima facie* was by way of punishment and not termination *simpliciter*. As is well established, even though the order of termination may be couched in terms of an order of termination *simpliciter*, a Labour Court to which an industrial dispute is referred to for adjudication is entitled to go behind the apparent language of the order in question and consider whether the order is termination *simpliciter* or is imposed by way of punishment. The Labour Court with which also the High Court agreed, came to the conclusion that the order was not one of termination of services *simpliciter*, but was by way of penalty imposed upon respondent 3 for the aforesaid irregularities. There is nothing to show that the said conclusion was either unreasonable or perverse, and consequently the High Court would not be entitled to interfere with such a finding in a writ for *certiorari*. The High Court was therefore, right in refusing to interfere with the finding of the Labour Court in exercise of its prerogative jurisdiction.

7 It is quite clear from the record that the cause of respondent 3 was taken over and espoused by the respondent-union before the conciliation officer. The dispute, therefore, was an industrial dispute referable under section 10 (1) of the Industrial Disputes Act by the Government of Bihar and the reference was a competent one.

8 The next question is whether the appellant corporation was the successor in title of the said Rajya Transport Authority and therefore, the obligations and liabilities of the said Authority devolved on the appellant corporation. The contention was that it was not such a successor in title and that once the Rajya Transport Authority ceased to carry on the said undertaking, the relationship of master and servant between that Authority and respondent 3 ceased, and therefore, whatever remedy respondent 3 had would be against that Authority and not against the appellant corporation. It was also contended that under the terms of the notification by which the appellant corporation was set up the corporation took over only the powers and functions of the said Authority and not its obligations and liabilities. Consequently,

the order of reinstatement and compensation was contrary to law.

9 The appellant-corporation, as afore said, was set up by means of the notification dated 20th April, 1959, issued under section 30 f the Road Transport Corporations Act, 1950. Under clause 2 of that notification the appellant-corporation was empowered to exercise all the powers and perform all the functions which were till then exercised and performed by the Rajya Transport Authority. It is manifest that the powers and functions of the Rajya Transport Authority were to carry on and conduct the transport undertaking. For that purpose its principal function would be the administration and management of that undertaking which would necessitate the employment of an adequate staff of employees. Employment of such a staff and regulating their conditions of service, including disciplinary action, would clearly be one of the powers or functions of the Rajya Transport Authority, which power or function was also to be exercised and performed by the appellant-corporation under the said notification. Furthermore in paragraph 5 of the writ petition filed by the appellant corporation in the High Court, the corporation in clear terms averred that it had taken over as from 1st May, 1959 such of the employees of the Rajya Transport Authority into its service who were on the rolls of the said Authority on the date it came into existence. As rightly observed by the High Court, on a proper construction of the said averment, if the termination of the services of respondent 3 was invalid, it never became operative and respondent 3 therefore, would be deemed to be continuing in the service of the Rajya Transport Authority on 1st May 1959 and therefore, on its rolls. In that view, the appellant corporation must be deemed to have taken over the services of respondent 3. The argument, however, was that the true meaning of the said averment was that only those of the employees of the Rajya Transport Authority who were actually on its rolls were taken over and not those who were deemed to be on its rolls. It is difficult to understand the distinction sought to be made between those whose names were actually on the rolls and those whose names, though not physically on the rolls, were deemed in law to be on the rolls. If respondent 3

continued in law to be in the service, it makes little difference whether his name actually figured in the rolls or not. The expression "on the rolls" must mean those who were on 1st May, 1959, in the service of the Rajya Transport Authority. By reason of the order discharging him from service being illegal, respondent 3 was and must be regarded to be in the service of the said Authority, and therefore, he would be one of these whose services were taken over by the appellant-corporation.

10. Apart, therefore, from the question of the appellant-corporation being the successor-in-title of the said Authority, respondent 3, in the absence of any valid termination of his services, continued and still continues to be in the service of the appellant-corporation since 1st May, 1959 and therefore, the corporation was bound to pay his wages including all the emoluments to which he was entitled as from 1st May, 1959. For the period from February to April the Rajya Transport Authority was liable to pay his wages and other emoluments, if any, to which he was entitled. The corporation, as successor-in-title of the said Authority, became liable to pay the said wages for the said period and not from February to September, 1959, as directed by the Labour Court.

11. The proper order, therefore, would be that respondent 3 is deemed to be in the service of the appellant-corporation from 1st May, 1959 and therefore, the corporation is liable to pay his wages and emoluments as from 1st May, 1959. As the successor-in-title of the said Authority, it became also liable to pay his wages and emoluments for the months of February to April, 1959. Except for this modification of the order passed by the Labour Court the award stands. The appeal fails and is dismissed with costs, such costs being one hearing fee only.

V.M.K.

Order modified;
Appeal dismissed.

THE SUPREME COURT OF INDIA.
(Civil Appellate Jurisdiction.)

PRESENT :—*M. Hidayatullah, C.J. and A.N. Ray, J.*

The Bihar State Board of Religious Trust
*Appellant**

v.

Palat Lall and another *Respondents.*

Trusts—Family idol and the worshippers all along members of the family—Public has no right of worship as of right—No intervention by the public at any stage—Trust, not a public trust under the Bihar Hindu Religious Trust Act, 1950.

The facts are that the idol in the present case had been in the family for a number of years and only the family was doing the *seba-puja* in the Thakur Dwara, and there is no mention anywhere that the public ever looked after this idol and were allowed a share in the worship as of right. Further, by the will also the author of the dedication did not make it clear that the public were to be admitted as of right thereafter. The whole of the arrangement shows that the further looking after of Thakurji was to be the concern of the family and it was only under the nomination of the family that a particular person of the Vaishnava belief was to be in charge after the demise of the members of the family who were to become the mutawallis after the death of the testator. Now, if it was intended that this should have been a public endowment, it is quite obvious that when the testator died, the testator would have thought of somebody from the public instead of the ladies who could not carry on the *puja* except through others. It was after his own death and his wives and sister were not available that a particular person was to be chosen for the *seba-puja*. Not only that. The idol was a family idol and the worshippers had all along been the members of the family. Therefore, the conclusion is inescapable that the trust is a private trust and does not come within the purview of the Bihar Hindu Religious Trusts Act.

[*Paras. 8, 9, 12.*]

The exemption from income tax claimed in respect of the income of the endowed properties was with a view to securing some income are not because it was a public endowment. The nature of the endowment is to be derived only from the tenor of the document and the conduct of the public who visit the Thakurji.

[Para 10]

Appeal from the Judgment and Decree dated the 15th January, 1964 of the Patna High Court in Appeal from Original Decree No. 321 of 1959

D Goburdhun and R Goburdhun, Advocates, for Appellant

R C Prasad, Advocate, for Respondent No. 1

The Judgment of the Court was delivered by

Hidayatullah C J—This is an appeal against the judgment of the High Court at Patna dated 15th January, 1964, affirming the decision of the Court of first instance. The case arose in the following circumstances

2 One Chaudhary Lal Behari Sinha, who was the uncle of the two plaintiffs (respondents in this appeal) made an endowment by a will executed by him on 2nd December, 1908, by which certain properties were endowed in favour of an idol called 'Ram Janakiji' also known as Shri Thakurji installed in the family house of the testator. The testator said that his parents had installed this idol inside their house and they used to perform the *puya* and he had also been performing the *puya* since the time he had attained the age of discretion. The testator went on to say that he had married two wives but no son had been born to him from either of them although he had a daughter and there was also a daughter's daughter. When he made the will, he had his two wives living two sister's sons, Babu Uma Kant Prasad and Babu Gouri Kant Prasad and a daughter's daughter Giriraj Nandini Kuari. By the will, he arranged for the *seba puya ragbhog samaiya utsava* of Thakurji and for the festivals and expenses of the *sadabart* of the visitors to be carried on, just as he had been doing. He nominated his two wives and his sister Ram Sakhi Kuari widow of Babu Gudar Sahai, as

'mutawallis, managers and executives' so long as they remained alive. He ordained that they should look after the management of the estate of Shri Thakurji with unanimous opinion, as had been done since long that after their death, a son of a Srivastava Kayastha and Visnu upasak (worshipper of Lord Visnu) should be appointed 'mutawalli, manager and executive' of the estate of Shri Thakurji, and that his wives and sister should appoint him during their life time with the advice of and in consultation with a certain Shri Jawharikh, resident of Baikunthpur, who was his guru. He divided the house into two parts. The inner apartment of the house was to remain in the possession of his wives and sister during their life time and the entire outer house together with the house situated at Sitamarhi, was to belong to the estate of Shri Thakurji. All money in cash and the movable properties belonging to him would remain in the custody of his wives. To the will was appended a schedule which showed the details of the properties. That included four villages in sixteen annas share, three villages in eight annas share, and one village in twelve annas share. The will also made certain bequests in favour of some of his other relations, but with them we are not concerned. They are minor as compared with the properties dedicated for the upkeep of Shri Thakurji.

3 When the Bihar Hindu Religious Trusts Act, 1950, came to be passed, a notice was sent to the plaintiffs by the Board constituted under that Act, calling upon them to file certain particulars on the basis of the Act, in view, as the notice said, of the properties constituting a public Hindu Religious trust. The present suit out of which this appeal arises was thereupon filed by the plaintiffs after serving a notice under section 78 of the Act upon the Board for a declaration that the suit properties were not subject to the Bihar Religious Trusts Act, and were private endowments.

4 Vast oral evidence was tendered in the case on behalf of the plaintiffs, and certain documents were filed. On the basis of the evidence in the case, which was accepted by the learned trial Judge, it was decided that the endowment was private to which the Act was not appli-

cable. Before the learned trial Judge, reference was made to a decision of this Court, reported in *Deoki Nandan v. Murlidhar*¹. To that case, we shall come presently. The learned trial Judge distinguished that case and held that the endowment in the present case could not be held to be a public trust, because it was in favour of a family deity.

5. An appeal was unsuccessful in the High Court. The High Court agreed with the learned trial Judge that the endowment created a private and not a public trust. The High Court did not consider the evidence in the case, which, according to the learned judges, had been adequately summed up by the trial Judge and whose conclusion was accepted. Before the High Court also, the same case of this Court was cited. But it was also again distinguished on the grounds that this idol was a family idol and had not changed its character since the endowment or at the time of the endowment.

6. In this appeal, the only question that has been raised is whether the trust is a public trust, to which the Bihar Hindu Religious Trusts Act attaches, or is a private trust which does not come within the purview of that Act. Mr. Goburdhun, who argued the case, pointed out a number of circumstances from which, he said, it could be easily inferred that the endowment was a public one and that the Act applied. According to him, the testator was childless and, therefore, there was no need for him to preserve the property for his family, that he had dedicated large properties for the upkeep of the idol, and the largeness of the properties indicated that it must have been for the benefit of the worshippers drawn from the public and not from the family, that on the extinction of the line of shebait consisting of the two wives and the sister of the testator, the shebaitship was to go to a person of a different community on the advice of a stranger and that there was no mention in any of the deeds that the public were not to be admitted to the worship of Thakurji. He also relied upon the same case to which we have referred, and also upon a decision of this Court in *Swami Saligramacharya v. Raghavacharya and others*.²

7. As early as (*Babu Bhagwan Din and others v. Gir Har Saroop and others*)¹, the Privy Council distinguished between public and private endowments of religious institutions, particularly, temples and idols, and Sir George Rankin laid down certain principles to which attention may be drawn, because they were referred to in that Supreme Court ruling on which Mr. Goburdhun strongly relies. Sir George Rankin said that the dedication to the public was not to be readily inferred when it was known that a temple property was acquired by grant to an individual or family. He also observed that the fact that the worshippers from the public were admitted to the temple was not a decisive fact, because worshippers would not be turned away as they brought in offerings, and the popularity of the idol among the public was not indicative of the fact that the dedication of the properties was for public. This ruling was referred to in the case on which Mr. Goburdhun relies.

8. In that case, emphasis was laid on two matters and they are decisive of the case we have here. The first no doubt was that the dedicator in that case had no male issue, and that it would be unusual for a person to tie up the property for the use of a deity without creating a public trust, but the second was that a ceremony of *pratishtha* (installation of the idol), which was equivalent to *utsarg* (dedication), was performed and, therefore, the idol itself became a public idol after the ceremonies. This is not the case here where an idol had existed from before as a family idol. In the earlier case of this Court the installation of the idol and the dedication were both done at the same time, and the installation was public. This, in our opinion, was a very cardinal fact in that case. This was emphasized not only by the trial Judge but also by the learned Judges of the High Court. The facts here are that the idol had been in the family for a number of years and only the family was doing the *seba-puja* in the Thakur Dwara, and there is no mention anywhere that the public ever looked after this idol and were allowed a share in the worship as of right. Further, by the will also the author of the dedication did not make it clear

1. (1961) 3 S.C.R. 20.

2. C.A. No. 645 of 1964 decided on 4th November, 1965.

1. (1940) 1 M.L.J. 1: (1910) L.R. 67 I.A. 1.

that the public were to be admitted as of right thereafter. The whole of the arrangement shows that the further looking after of the Thakurji was to be the concern of the family, and it was only under the nomination of the family that a particular person of the Vaishnava belief was to be in charge after the demise of the members of the family who were to become the mutawallis after the death of the testator. It is obvious that in this family there was no male issue and therefore, there was nobody to carry on worship and make arrangements for the *seba puja* of Thakurji, as had been done in the family. Some other kind of arrangement had to be made and this arrangement was made by the will. No more can be read into it than what is said there.

9 Now, if it was intended that this should have been a public endowment, it is quite obvious that when the testator died, the testator would have thought of somebody from the public instead of the ladies who could not carry on the *puja* except through others. It was after his own death and his wives and sister were not available that a particular person was to be chosen for the *seba puja*. There is no arrangement here that public were to look after or manage the Thakurji. At no stage any intervention of the public is either intended or allowed by the will in question.

10 Two other documents were brought to our notice but they may be disposed of summarily. The first is a mortgage deed, Exhibit B, in which there is a recital about the property which was the subject of the endowment. But that document is silent about the nature of the endowment and is of no significance. The other document is a judgment of the Assistant Commissioner of Agricultural Income tax, Exhibit C, in which exemption was claimed in regard to income as was set apart for charitable and religious trusts in terms of the trust deed. This is an attempt to show that the family regarded it as a public trust. What a person does with a view to claiming exemption from income tax or for that matter, agricultural income tax, is not decisive of the nature of the endowment. The nature of the endowment is to be discovered only from the tenor of the document by which the endowment is created,

the dealings of the public and the conduct and habits of the people who visit such a temple or Thakur Dwara. The claim to exemption was with a view to saving some income of the endowed property. It might have been motivated from other considerations and not that it was a public endowment.

11 This brings us to the second case which was cited before us. But even in that case, a reference was made by the learned Judges to the earlier case and they have extracted a passage from the earlier judgment, in which it was observed that

“when property is dedicated for the worship of a family idol it is a private and not a public endowment, as the persons who are entitled to worship at the shrine of the deity can only be the members of the family, and that is an ascertained group of individuals. But where the beneficiaries are not members of a family or a specified individual then the endowment can only be regarded as public, intended to benefit the general body of worshippers.”

12 In the present case, the idol was a family idol and the worshippers had all along been the members of the family. Indeed the evidence is overwhelming on that score. The learned trial Judge mentions that very important and leading persons gave evidence in that behalf. In the judgment of the trial Judge, a list is given which includes PWs 3, 7, 12, 14, 15 and 16 of village Kusmar. In addition there are PW 17, who is an advocate of Sitamarhi, PW 6 who is a respectable witness, being a chemist, PW 8 who is also a pleader, and PWs 11 and 13 who are mokhtars and acquainted with Somari Kuer. These respectable persons had occasion to know the family of Chaudhury Lal Behari Singh, and therefore, were competent to speak on the fact that Shri Ram Janakji were the family deities of Chaudhury Lal Behari Singh. In the case to which we were presently referring, the circumstances connected with the establishment of the temple were such that they could be only consonant with a public endowment. It was no doubt a private temple of which the sole proprietor was one Madras Swamiji, but he, however,

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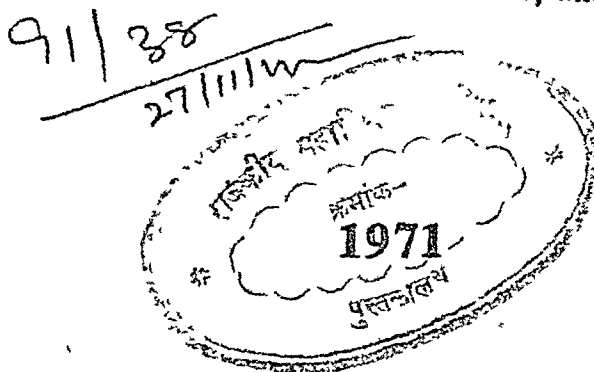
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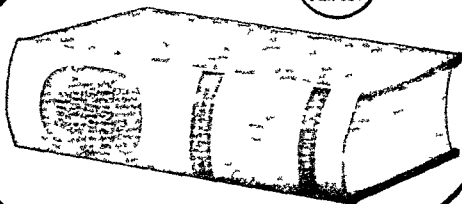
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THE QUESTION OF JURISDICTION IN THE PRIVY PURSES CASE*

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In order to examine the question whether the Supreme Court rightly assumed jurisdiction in the recent privy purses case, it is necessary to understand Article 363 of the Constitution which reads as :

(1) Notwithstanding anything in this Constitution but subject to the provisions of Article 143, neither the Supreme Court nor any other Court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, *sanad* or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, *sanad* or other similar instrument.

(2) In this article—

(a) "Indian State" means any territory recognised before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State ; and

(b) "Ruler" includes the Prince, Chief or other person recognised before such commencement by His Majesty or the Government of the Dominion of India as the Ruler of any Indian State.

It is obvious that whether the Supreme Court had jurisdiction in the case would depend upon the ambit of Article 363. In other words, it is to be seen whether the Presidential Order derecognising the Princes gave rise to a dispute within the meaning of Article 363. If it did, it was barred from the jurisdiction of Courts including the Supreme Court ; otherwise not.

The Presidential Order derecognizing the Princes was passed under Article 366 (22) which reads as follows :

"Ruler" in relation to an Indian State means the Prince, Chief or other person by whom any such covenant or agreement as is referred to in clause (1) of Article 291 was entered into and who for the time being is recognised by the President as the Ruler of the State, and includes any person who for the time being is recognised by the President as the successor of such Ruler.

The sums of privy purses were guaranteed by covenants and agreements which

* *Madhav Rao Scindia v. Union of India*, (1971) 1 S.C.J. 295; (1971) 1 S.C.C. 85; A.I.R. 1971 S.C. 530.

were recognised by Article 291 of the Constitution as follows

Where under any covenant or agreement entered into by the Ruler of any Indian State before the commencement of the Constitution, the payment of any sums, free of tax, has been guaranteed or assured by the Government of the Dominion of India to any Ruler of such State as privy purse—

(a) such sums shall be charged on, and paid out of, the Consolidated Fund of India and

(b) the sums so paid to any Ruler shall be exempt from all taxes on income

Faced with the objection to jurisdiction the judges making the majority observed in the first instance, that the dispute before them was not of the kind mentioned in Article 363. For instance the learned Chief Justice observed that the main dispute was as to the validity of the action of the President in withdrawing recognition from the Rulers. In his view

This question is independent of Article 363 and has no bearing upon any covenant etc. It relates only to the power of the President in behalf of recognition. The Court is, therefore, free from Article 363 to consider whether the act can be sustained or not.¹

Justice Hegde also viewed it as the dispute relating only to the power of the President. In his own words

What is in dispute is the true scope of the power of the President under Article 366 (22). That dispute does not fall within Article 363.²

The majority judgment delivered by Justice Shah contains a similar observation

A dispute that an order of an executive body is unauthorised or a legislative measure is *ultra vires*, is not one arising out of any covenant under the first limb of Article 363, merely because the order or the measure violates the rights of the citizen which, but for the act or measure, were not in question.³

This was in fact a superficial way to do away with the question of jurisdiction. A simple question as to the *locus standi* of the petitioner or the basis of their right was enough to penetrate deep into the matter and reach the heart of it. Therefore, it became necessary to interpret Article 363 and spell out its ambit. The main consideration taken into account by the majority judges before proceeding to interpret Article 363 is that since this Article excludes jurisdiction of Courts, such an exclusionary provision should be interpreted strictly because an aggrieved party is involved and the Court must as far as possible lean in favour of extending its jurisdiction to do justice in the case.

With due respect to Judges of the Supreme Court, it is submitted that this rule of interpreting a provision which excludes jurisdiction may be applicable to ordinary laws where the exclusion of jurisdiction is susceptible of two or more interpretations but certainly not to a constitutional provision expressed in clear and unambiguous terms, using a *non obstante* clause.

The Court construed this article in this way. Article 363 bars jurisdiction of Courts in the two types of disputes, namely, (i) disputes arising out of any provision of a treaty, agreement, covenant, engagement, *sanad* or other similar instrument which was entered into or executed before the commencement of the constitution by any Ruler of an Indian State and to which

¹ Madhav Rao Scindia v Union of India, (1971) 1 SCC 85 (1971) 1 SCJ 295 A.I.R. 1971 SC 530 at 554

² *Ibid* 630

³ Madhav Rao Scindia v Union of India (1971) 1 SCJ 295 (1971) 1 SCC 85 A.I.R. 1971 SC 530 at 577

the Government of the Dominion of India or any of its predecessor governments was a party and which has or has been continued in operation after such commencement ; and (ii) disputes in respect of any right accruing under or any liability or obligation arising out of any provision of the Constitution relating to any such treaty, agreement, covenant, engagement, *sanad* or other similar instrument. The first category of disputes is covered by the first limb of Article 363 and the second by the second limb of Article 363. In other words, jurisdiction to try proceeding is barred under the first limb of Article 363 if the dispute arises out of the provision of covenant ; it is barred under the second limb of Article 363 if the dispute is with respect to a right arising out of any constitutional provision relating to a covenant.

The Court held that a dispute relating to any matter under Article 362⁴, would be barred under the first limb of Article 363, because Article 362 is a provision relating to covenants within the meaning of Article 363. Regarding the dispute in the case, the Court has rightly held that it clearly does not fall within the first limb of Article 363. Therefore, the question of jurisdiction boils down to this : Does the dispute arising out of Article 291 (the provision recognising the agreements, covenants etc.) fall under the second limb of Article 363? The answer to this question depends on whether or not Article 291 is a constitutional provision relating to covenant or agreement. If it is, then it would be barred under the second limb of Article 363; otherwise not.

4. Indian Constitution, Art. 362. In the exercise of the power of Parliament or of the Legislature of a State to make laws or in the exercise of the executive power of the Union or of a State due regard shall be had to the guarantee or assurance given under any such covenant or agreement as is referred to in Article 291 with respect to the personal rights, privileges and dignities of the Ruler of an Indian State.

Now, how to determine whether Article 291 is a provision relating to covenants, agreement etc. or not? The Supreme Court applied a criterion called "dominant purpose" of the Article. The learned Chief Justice Hidayatullah took the view that the words "relating to" mean that "the provisions must bear upon treaties etc., as its dominant purpose or theme. It is not sufficient if the treaties etc., are mentioned there for some collateral purpose⁵." Again he observed, "It is the dominant purpose and theme which alone determine the quality of the provision⁶." He asked a question as to whether Article 102 (c) is a provision relating to 'membership' or 'insolvency' and he got the reply that it was relating to the former and not the latter. This criterion of dominant purpose he applied to Article 291 and held :

The Article (291) is self-sustaining and self-ordaining. Its purpose is not relating to covenants etc., but to something else..... The main and only purpose of the provision is to charge privy purses on the Consolidated Fund of India and make obligatory their payment free of taxes in income⁷. Justice Shah delivering the majority judgment observed :

Reference to the covenant in Article 291 merely identifies the sum payable as privy purses ; it does not make Article 291 a provision relating to the covenant. A dispute as to the right to receive the privy purse is therefore not a dispute arising out of the covenant within the first limb of Article 363, nor is it a dispute with regard to a right accruing or obligation arising out of a provision of the Constitution relating to a covenant⁸.

5. *Madhav Rao Scindia v. Union of India*, (1971) 1 S.C.J 295; (1971) 1 S.C.C. 85; A.I.R. 1971 S.C. 530 at 559.

6. *Ibid*.

7. *Ibid* at 561.

8. *Ibid* at 579.

With due respect to the learned Judges, it is submitted that the criterion of "dominant purpose" is entirely irrelevant so far as the question of determining whether a provision is "relating to" is concerned. Determining the dominant purpose of a provision is one thing but finding to what object or objects it is relating to is quite another. These two are quite different and distinct from each other and one cannot be employed to determine the other. The words *to relate* mean to narrate, to recount, to bring in relation, and to establish relation between. Therefore, the right answer to the question whether Article 102 (c) relates to *membership* or 'insolvency', is that it related to both. To say that it only relates to 'membership' is clearly wrong because there is no reason for excluding its relationship with insolvency. To the question as to what the dominant purpose of Article 102 (c) is, the only answer, of course, is *membership*. But the *purpose* and *relationship* are not to be confused. Therefore in order to determine whether Article 291 is relating to any treaty etc., the criterion of *dominant purpose* is not relevant at all. Here the simple question as to whether Article 291 brings into relationship with agreements etc., would have been enough. The very language of Article 291 is so clear that it establishes a deep relationship with the covenant or agreement etc. The argument that the reference to the covenant in Article 2 merely identifies the sum payable as privy purses, and, therefore, it does not make Article 291 a provision relating to the covenant, would have been valid if the sums of privy purses had stood independent of the covenants. But it is to be noticed that the sums of privy purses are provided in the covenants themselves. Therefore even if it is held that Article 291 identifies the privy purse sums, there is no escape from the conclusion that Article 291 related to the covenants. By no criterion whatsoever can it be

characterised as not having any relation to the covenants, agreements etc.

It is submitted that by first elevating the words *relating to* to the *dominant purpose* and then applying the test of "dominant purpose" to determine *relating to*, the process itself is tantamount to arguing in a circle.

The learned Chief Justice Hidayatullah further observed

If the Article (363) had said 'in any dispute in respect of any right accruing under or any liability or obligation arising out of Articles 291, 362 and 366 (2)', all controversy, in this case would have been at end⁹

It is submitted that there is no doubt that the Constitution framers had a clear intention to make Article 363 take in any dispute arising under Articles 291, 362 and 366 (2). Shri T T Krishnamachari while moving the Article 363 in the Constituent Assembly explained the scope of this article in these words

The idea is that the Court shall not decide in this particular matter. It is subject only to the provisions of Article 119 (the present 143) by which the President may refer the matter to the Supreme Court and ask for its opinion and the Supreme Court would be bound to communicate its opinion to the President on any matter so referred by him.

The House will remember that there are a few articles in this Constitution, specifically 302 A (the present Article 291) and 267 A (the present Article 362) where there are references to these agreements, covenants, *sanads* etc. and even these are precluded from adjudication by any Court¹⁰

9 *Madhav Rao Scindia v Union of India* (1971) 1 S.C.J. 295 (1971) 1 S.C.C. 85 A.I.R. 1971 S.C. 530 at 538

10 10 C.A.D. 346

Therefore, it is clear beyond any shadow of doubt that Article 291 is a provision clearly barred under Article 363.

The consideration that in determining the scope of Article 363, special regard must be had for the fundamental rights, is misconceived.¹¹

it lay beyond their jurisdiction. In this regard, the minority judgments handed down by Justice Ray and Justice Mitter are very sound on the question of jurisdiction.

The Article (363) commences with the opening words 'notwithstanding anything in this Constitution.' These exclusionary words are no doubt potent enough to exclude every consideration arising from the other provisions of the Constitution including the chapter on fundamental rights, but for that reason alone we must determine the scope of that article strictly.¹²

The *non obstante* clause used in the Article leaves no doubt that it was meant to exclude every provision of the Constitution including the provisions on fundamental rights and the undue importance attached to the chapter on fundamental rights was uncalled for.

With due respect to the learned Chief Justice, it is submitted that to construe Article 363 strictly on the significance of fundamental rights, when these stand expressly excluded by the founding Fathers, is nothing else than re-writing the Constitution and in doing so the Court is over-stepping the limit put to the judicial review by the Constitution. Where the Constitution makers oust jurisdiction of the Courts in the clearest possible words, it is but meet that Courts keep themselves within the limits, even if their sense of justice moves them to entertain the case. The privy purse case was a proper case where the Courts should have declined to entertain any dispute, even if the order might seem to be unjustifiable, because

11. Shah, J. (majority judgment) enumerated this as one of the considerations 10 C. A. D. 346 at 576.

12. *Per* Hidayatullah, C.J., *Ibid* at 558.

WOMEN'S RIGHTS OF INHERITANCE AND FRAGMENTATION OF AGRICULTURAL HOLDINGS SOME OBSERVATIONS

By

B SIVARAMAYYA *

At the time of the passing of the Hindu Succession Act 1956 a considerable section of the people was of the view that the Act should not be made applicable to agricultural properties as it would result in undesirable fragmentation of farm lands. Even now there is a body of opinion which is strongly opposed to the application of the Hindu Succession Act to agricultural properties. In fact in the States of Haryana and Punjab moves are afoot to amend the Hindu Succession Act to exempt agricultural holdings from the operation of the Act.¹ These attempts derive considerable support from the exemption (of doubtful wisdom) provided in favour of agricultural tenancies in section 4 (2) of the Act.²

The argument relating to fragmentation in all probability will be put forward more acrimoniously if ever the Legislature intends to put restrictions on testation akin to Muslim Law, on the grounds of social policy. The bulk of immovable properties in India is agricultural and any exemption of these properties from the scope of the Hindu Succession Act will have far reaching consequences on the inheritance rights of women. The aim of this paper is to show that there are more satisfactory solutions to the problem of fragmentation than the retrograde measure alleged to be in the contemplation of the States of Haryana and Punjab.

There can be no denial of the fact that fragmentation is a serious problem in India. "About 12 per cent of the estimated 72 million rural households owned no land at all. The rest numbering approximately 63 million, owned among themselves an estimated 318 (8/8⁷) million acres of land which works out to an average of a little less than 15 acres per owner."³ The problem is seriously aggravated by the existing laws of inheritance. Patel writing in 1954 stated:⁴

The causes mainly responsible for the process [of sub-division of holdings of right holders] are the laws of inheritance of the Hindus and Muslims which enjoin succession to immoveable property by all the heirs usually in equal shares. At the outset a fallacy of the current argument that conferring rights of inheri-

Succession Act and not according to section 40 of the Delhi Land Reforms Act 1954. Derrett also expresses the view that the exemption provided in section 4 (2) of the Hindu Succession Act is an 'extraordinary anomaly'. Derrett *a critique of modern Hindu Law* 230 (1970).

3 Regional Variations in Social Development and Levels of Living 44 (1967) PEO Publication No 52.

4 Patel *The Indian Land Problem and Legislation* 224 (1954).

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1 Sarkar *The Hindu Succession Act 1 Gill Daughter's Right of Succession in Her Father's Property* 7 Proceedings of the All India Seminar on Hindu Law held at Kurukshetra University 9th to 13th April, 1971.

2 The holding of a *bhumidhar* in U.P. devolves according to the rules provided in section 171 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950. This Scheme shows a strong preference for male lineal descendants. But for practical purposes the position of a *bhumidhar* is not very different from the owner of agricultural land in States like Maharashtra. He pays land revenue and not rent. He can exercise the rights of alienation, partition, improvement, succession, surrender and abandonment. Vide *Srivastava Commentaries on U.P. Zamindari Abolition and Land Reforms Act* 283 (2nd Ed. 1964). Interpreting a parallel enactment the Punjab High Court held in *Gopi Chand v Bhagwan Devi* AIR 1964 Punjab 272, that *bhumidhar's* rights will devolve according to the provisions of the Hindu

tance in agricultural lands would lead to fragmentation should be pointed out. If fragmentation of agricultural lands is the main consideration, the choice should be between a single heir succession and partitive succession and not between a succession among sons only and succession among all children. Cecil defended primogeniture on the ground that it avoids parcelling up of lands⁵. The Federal Hereditary Farm Law adopted by Nazi-Germany in 1933 brings to focus this point. Under this legislation a hereditary farm (Ürbhofe) could be inherited only by one principal heir⁶. Further, equal division among the heirs without the distinction of sex is the rule now for estates governed by the Dayabhaga law, for the devolution of separate properties under the mitakshara law and under the Indian Succession Act. It should also be emphasized that under the Muslim law, the right of a female heir extends to all kinds of properties.

The Hindu Succession Act, 1956 by providing the right of pre-emption in favour of other heirs, whenever a co-heir sells his interest in property or business, in a limited measure secures against fragmentation of agricultural holdings.

The first major change that is suggested here is to enact that the claim of an heir in respect of agricultural land, where the division of an agricultural holding would result in fragmentation (that is to say, would reduce the plots to less than the "standard area"). would be a money claim only and not for specific share in the holding. In other words, a considerable change in the rules stated in section 19 of the Hindu Succession Act will have to be effected. The experience of France and the position that prevails

now under the French Civil Code on the topic of compulsory portions⁷, will serve to illustrate the point.

Formerly under the French law the compulsory portion was a share of succession but this provision resulted in an undesirable fragmentation of farm lands and the laws of inheritance in France were amended in 1938, 1943, and in 1955, especially Articles 815 to 832, to provide that in the case of farms, business interests and dwelling houses the compulsory portion should only be a claim over the estate⁸. On this topic the French Code adopted the approach of the German Civil Code. Under the German law the claim of a person entitled to a compulsory portion "is a money claim against the testator's heirs, which accrues on the date of the testator's death and is capable of assignment and transmissible on death"⁹. Such a money claim will prevent uneconomic fragmentation of lands.

Two incidental questions arise in this context : (1) Among the competing heirs who should be entitled to retain the farm if its division is uneconomical (2) On what principle is the choice to be made? These questions are closely and related and an answer to the second will determine the first. As to the latter question, two approaches are possible. First, to leave the determination of heir entitled to the farm to the Court, and second, to select the heir on the principle of seniority. It may be pointed out that the Report of Committee of Inquiry on the Law of Succession in

7. A reserve or compulsory portion in French law is a share in succession which an ascendant or descendant is entitled to indefeasibly even against the will of a deceased.

8. See generally Moral-Lopez, *Principles of Land Consolidation Legislation* 107 (1962).

9. Schuster, *The Principles of German Civil Law* 627 (1907) citing BGB Article 2317.

5. Cecil, *Primogeniture* 83 (1895).

6. See 16 *Journal of Farm Economics* 326 (1934).

Scotland preferred the principle of seniority¹⁰ The Report states¹¹

"It was suggested to us in the evidence that the best way of regulating the right to succeed might be that it should be left to the Land Court to determine the member of the family most fitted to take over the farm if the family themselves could not agree on the matter. We think that this might often lead to bad feeling amongst members of families and that it would be better to have a positive rule of law regulating the right of succession. Order of seniority in the family seems to us to be the fairest principle upon which to base the devolution of the right or option to take over the farm, immediate children in all cases having preference over grand children or remoter descendants but no preference being given to males over females. A daughter may be and sometimes is the most suitable member of the family to succeed her father in the running of the farm. No doubt it will often not be so but we think that economic and financial considerations will tend to bring the exercise of the option into the hands of the member of the family best qualified to have the farm. The Banks and Live Stock Auctioneers who in almost all cases will have to advance much of the capital necessary to enable the member of the family succeeding to the farm to pay out the co heirs and to stock the farm would be unlikely to give any backing to a person obviously unfitted to run the farm."

In the writer's opinion however, the right to succeed to the farm should be decided by a Probate Court taking into account all the relevant factors including seniority. The needs of food production

and the obligation of an heir who inherits the farm to compensate other heirs suggest that efficient management of the land ought to be the main consideration in the choice. A mechanical adherence to the principle of seniority will not be conducive to a proper selection.

Purchase of Interest of other Heirs

It can legitimately be asked. How can an heir who gets the right to retain the farm find the resources to compensate the other heirs? It is submitted that in India the Swiss and Japanese techniques should be adopted cumulatively to meet the situation. The Swiss technique can be followed even under the existing law in India, whenever a division of land will reduce its extent to less than the standard area¹². Under Article 622 of the Swiss Civil Code an heir to whom a farm has been allotted can claim that the partition be postponed so far as the farm is concerned when he is heavily burdened by the rights of his co heirs. In such cases the heirs are given an undivided interest in the rents and returns of the farm¹³.

12. In the Punjab and Haryana transfers of "fragments (holdings less than the standard area) are prohibited. Fragments may be sold to adjoining landowners but if they refuse to purchase the State will acquire them. See The Consolidation of Holdings and Prevention of Fragmentation Act 1948.

13. By way of illustration Articles 616, 620, 621 and 622 of the Swiss Civil Code are given below.

616. The Cantons can direct that land shall not be cut up into smaller areas than a definite minimum fixed according to the requirements of the form of agriculture for which the land is laid out.

620. Where a farm forms part of the inheritance and one of the heirs is prepared to take it over and appears capable of managing it it must be allotted to him in its entirety if it forms as such an economic entity its valuation will be based on its annual return.

The heir can at the same time claim all the accessories to the farm in the form of agricultural implements, stores and stock.

10. Report of the Committee of Inquiry on the Law of Succession in Scotland (cmd 8144 reprint 1963).

11. *Ibid* at 11.

The technique adopted in Japan was to provide long-term credit to farmers to purchase the interests of the co-heirs. In Japan the Owner-Farmer's Maintenance and Establishment Credit Provision Law lists four main purposes of the credit to be provided. Among these the following finds mention: In case of joint inheritance, to prevent division of holdings by enabling one heir to buy out the shares of his brothers and sisters.¹⁴ Dore points out that the loans bear 5 per cent. interest and are to be repaid over a maximum of twenty years, repayment to begin after not more than three years.¹⁵ It must be emphasized that even now there are provisions in some State legislations to check fragmentation. The legislation in Uttar Pradesh deserves particular mention. Section 178 of the Land Reforms Act, 1950 provides that where a Court finds that the aggregate area of the holding to be partitioned does not

exceed three and one-eighth acres, it shall instead of dividing the holding, direct that it be sold and the proceeds be distributed among the parties concerned.¹⁶ It is submitted that this should be adopted as a general provision in the laws of succession in India.

Organization of the Probate Courts.

Earlier it has been suggested that Probate Courts should be entrusted with the function of settling the various matters that arise in relation to succession to farm lands. To give effect to such provision it should be provided that whenever an estate exceeds Rs. 5,000 in value probate or letters of administration should be obtained in all cases. A salutary effect of such compulsory requirement of probate and letters of administration is that it will check the defeat of the rights of female heirs by force¹⁷, fraud or collusion. Incidentally the extension of compulsory probate or letters of administration on intestacy will augment the revenues of Government.

At this stage it may be validly objected that we would be driving the simple village folks to resort to the dilatory and expensive processes of the Courts. To obviate this objection, it is suggested: (1) to cater to the rural communities, mobile Probate Courts should be provided and (2) in urban centres separate Probate Courts which sit for longer hours and during week-ends should be established.

[Para three omitted.]

621. Where one of the heirs is opposed to that plan or where several wish to take over the farm, the competent Probate authority decides the question of its allotment, sale or partition, after taking into account local custom or in default of this, the personal circumstances of the heirs.

Heirs who desire to carry on the farm in person have the first right to have it allotted to them as a whole.

Where none of the sons are willing to carry it on in person, the daughters can claim it, if they themselves or their husbands seem capable of carrying it on.

622. An heir to whom a farm has been allotted can claim that the partition be postponed so far as the farm is concerned, where he is so heavily, burdened by the rights of his co-heirs in the farm, that in order to secure them against loss, he would be obliged to charge it to such an extent that the total charges on it, including already existing mortgages, would amount to more than three quarters of its assessed value.

In this case the heirs are given an undivided interest in the rents, and returns of the farm. (*The Swiss Civil Code* Williams' translation, 1925).

14. Dore, *Land Reform in Japan* 304 (1966) (reprint).

15. *Ibid.*

16. Section 178 of the Uttar Pradesh Land Reforms Act, 1950 as amended by the Uttar Pradesh Land Reforms (Amendment) Act, 1954.

17. Kulwant Kaur Gill, *supra* note 1 at 7.

ADMINISTRATIVE PROCESS AND THE VIABILITY OF THE PRIVILEGE AGAINST SELF INCRIMINATION: A PLEA FOR THE ADOPTION OF THIS CANON OF CRIMINAL JURISPRUDENCE AS A PRINCIPLE OF ADMINISTRATIVE LAW IN INDIA

By

I P MASSEY *

There is no more accurate index of a nation's regard for liberty and progress in civilization and culture than is to be found in the laws and procedures with which it treats its people accused of crimes. A sense of human dignity and self respect for the community demands that certain basic fundamental principles of fairplay and justice be observed while dealing with persons charged for violation of the laws and the norms of the society. Almost all the democratic countries of the world provide either directly in their constitutions¹ or statutes² or indirectly through their customs and traditions fortified by Courts decisions³ for certain fundamental principles of personal security and dignity. From among these privileges and principles the privilege against self incrimination is such which has evoked enquiry not only in India but in almost all the democratic countries especially in the face of the growing administrative process. The question of extracting incriminating evidences and information from a person or asking him

to do something which may incriminate him (taking foot print impression specimen of handwriting) or submitting a person to what may be called an 'invasion of body and privacy' (scars identification urine blood breath alcohol intoxicational or psychiatric tests) have frequently been forged in vehement controversies.

The Constitution of India in Article 20 (3) lays down this privilege against self incrimination in the following words:

No person accused of an offence shall be compelled to be a witness against himself. Without going into the details of the scope and ambit of the privilege against self incrimination as has been interpreted by the Supreme Court of India⁴ we focus attention on some selective aspects of its scope which would help in determining the area which it leaves uncovered in the face of growing administrative process. — —

In India the constitutional protection of Article 20 (3) is limited to accused persons in criminal proceedings only and does not extend to any other person⁵ in any civil or administrative proceeding.⁶

There is no controversy on the point that the protection under Article 20 (3) is available against compulsion only. No

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1 The privilege against self incrimination is provided in the Fifth Amendment of the U.S. Constitution and in the Constitutions of 48 States.

2 New Jersey (U.S.A.) provides for the protection in statute *State v. White* 27 N.J. 158. In India the protection as applied to witnesses is provided in section 132 of the Indian Evidence Act.

3 Iowa (U.S.A.) reads the privilege into Due Process clauses of its Constitution. *Amana Society v. Seler* 1959 Iowa 591.

4 *M. P. Sharma v. Satish Chandra* A.I.R. 1954 SC 300 (1954) S.C.J. 428. *Mad. Dasgupta v. State of Madras* A.I.R. 1960 SC 756 (1960) S.C.J. 726. *Raja Narain Lal Bansi Lal v. Inaneek Phiroz Mistry* A.I.R. 1961 SC 29 (1961) 1 S.C.J. 353. *State of Bombay v. K. H. Kalia Oghad* (1962) 3 SCR 10 (1963) 1 S.C.J. 195 (1963) M.L.J. (Cri) 97.

5 The protection to a witness has not been given a constitutional status and has been left to the general law of the land. Section 132 of the Indian Evidence Act, no answer which a witness shall be compelled to give shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer.

6 *State of Bombay v. K. H. Kalia Oghad* (1962) 3 SCR 10 (1963) 1 S.C.J. 195 (1963) M.L.J. (Cri) 97.

constitutional bar is attached if the accused person voluntarily gives self-incriminating evidences against himself. The accused person can be a competent witness against himself if he chooses to be. But there may be a difference of opinion as to what amounts to 'compulsion' in order to bring the evidence of the accused within the prohibition of Article 20 (3). One possible view may be that 'compulsion' means acts of positive physical force which are popularly known as 'third degree methods'. According to this view the nature of action and not the state of mind of the accused is to be taken into consideration. Another view on the other extreme may be that the word 'compulsion' besides physical force should also include psychological fear and inducement. Any incriminating evidence given by an accused should be taken as conclusive proof of 'compulsion' unless its voluntary nature is established beyond doubt. The interpretation of Article 20 (3) given by the Supreme Court leans towards the first view as it held that 'compulsion' in the context of Article 20 (3) means what may be called duress in law.⁷⁻⁸ In this age of science and technology which has placed more sophisticated instruments and methods in the hands of the administrators and investigators for extracting information, an interpretation of Article 20 (3) with reference to 'positive physical force' appears not only old fashioned but leaves much area uncovered for the mischief which Article 20 (3) seeks to remedy.

7-8. The Dictionary of English Law by Earl Jowitt defines Duress : 'Duress is where a man is compelled to do an act by injury, beating or unlawful imprisonment (sometimes called duress in strict sense) or by threat of being killed, suffering some grievous bodily harm, or being unlawfully imprisoned (sometime called menace or duress per mines) Duress also includes threatening, beating, or imprisonment of wife, parents or child of the person'

The protection against self-incrimination has been further limited to information which an accused person gives from his personal knowledge. The exclusion of all other forms of evidences which may be extracted from the accused from the protection of Article 20 (3) defeats the very policy behind Article 20 (3) *i.e.*, the policy of blocking the easy method of obtaining evidences from the accused by compulsion.

From the above statement it becomes clear that unlike the position in U.S.A. and U.K. the immunity against self-incrimination is limited to persons accused of violating penal provisions only and does not apply to witnesses or to civil and administrative proceedings.⁹ This leaves a wide area of administrative process uncovered by Article 20 (3).

The protection is further limited to cases which may be called 'third degree methods' and many other forms of compulsions known to the scientific world of today have been left out. This further adds to the area of administrative process already left uncovered.

The protection has been limited still further to only one type of evidence *i.e.*, which reflects the personal knowledge of the accused. This again leaves many other forms of evidences which may be more incriminating than personal knowledge without protection.

The administrative process has grown in India in a haphazard fashion because India is a developing country striving to establish a socialistic pattern of society. There has been a mushroom growth of administrative agencies and officers with various designations and powers. These agencies affect the lives of the people more than any other organ of the State. There is no procedure like the Tribunals

9. *Boyd v. U. S.*, (1886) 116 U.S. 633-34. *McCarthy v. Amdestien*, (1924) 126 U.S. 227.

and Enquiries Act in England or the Administrative Procedure Act in U.S.A. prescribing at least the minimum procedure for the administrative agencies to follow in adjudicating upon the rights of the people. Consequently in the absence of any set procedure the power of judicial review exercised by the Courts is substantially curtailed. The only effective instrument in the hands of the Courts to correct the defects of the procedure is 'natural justice'. Though the concept of natural justice is of varying content, traditionally the privilege against self-incrimination is not included in it. There seems to be no valid reason why this fundamental principle of personal liberty, fair play and justice is not included within the concept of natural justice especially in countries where either there is no express provision for this in the country's constitution or where the Courts have limited the scope and ambit of the privilege as has been done in India leaving a wide area of administrative process uncovered. Over zealous administrative officers and agencies exercising wide administrative investigatory and adjudicatory powers subject people to indiscriminate questioning and submit them to what may be called an invasion of body and privacy' with a view to extract incriminating evidences from them with impunity because the privilege of self-incrimination cannot be invoked due to the narrow interpretation given to Article 20 (3) by the Courts in India. Thus a void has been created which can be filled only by including the privilege against self incrimination within the concept of natural justice. If it is done the Courts in India can play their traditional role effectively of safeguarding the liberties of the people against administrative excesses.

[S.C. N.C. 39.]

S. M. Sikri, C J.

G. A. Vaidialingam and

A. N. Ray, JJ.

*Union of India v.
Ananthapadmanabhaiah.*

22-4-1971.

Crl A Nos 158 to
160 of 1970.

(A) Criminal Procedure Code (V of 1898), section 429—Point not raised before differing judges—If could be raised for the first time before the third judge.

The language of section 429 of the Code of Criminal Procedure, is explicit that the case with the opinion of the judges comprising the Court of Appeal shall be laid before another judge of the same Court and that the judgment or order shall follow the opinion of the third learned Judge. Thus, a new point not raised before the differing judges could be raised before the third judge.

(B) Prevention of Corruption Act (II of 1947), (as it stood prior to its amendment in 1964), section 5-A—Scope—Magistrate at Delhi if competent under section 5-A to authorise investigation of a case at Assam.

The words "Presidency Magistrate or a Magistrate of the First Class, as the case may be" in section 5-A of the Prevention of Corruption Act indicate that a Presidency Magistrate refers to the Presidency town where he exercises jurisdiction and similarly a Magistrate of the first class refers to a Magistrate of the first class of a district exercising power in that district. A Magistrate does not exercise jurisdiction throughout the length and breadth of India for purposes of the Code of Criminal Procedure, or of Prevention of Corruption Act. The Code of Criminal Procedure, defines the territorial jurisdiction of Magistrates. It will not be in consonance with the jurisdiction and structure of Courts of Magistrates to allow an order of investigation to be made by a Magistrate of Delhi for investigation of a case in the State of Assam. The reason is that a Magistrate orders investigation in a case which he has power to inquire into or try. The real import of section 5-A of the Prevention of Corruption Act, is that investigation is to be done by police officers of a certain rank to ensure protection

S-N R C

against frivolous prosecution and it is only with the order of Presidency Magistrate or a Magistrate of the first class that police officers below the rank mentioned in the section are allowed to investigate. It is therefore appropriate that Magistrate in Presidency towns or District will order investigation of cases within their respective jurisdiction.

Thus, in the present appeals, the order of investigation made by the Magistrate at Delhi for investigation of cases in the State of Assam was not a valid and competent order within the powers of the Magistrate at Delhi.

V.K.

[S.C.N.C. 40.]

Appeals

dismissed.

K. S Hegde and

A. N. Grover, JJ.

Sales Tax Commissioner, U. P. v.

M/s. Latha Singh Mal Singh.

27-7-1971.

C.A. No. 564 of 1967.

U. P. Sales Tax Act (XV of 1948), section 3-A—Notification issued under, dated 8th June, 1948—Cloth manufactured, by means of power-looms—If 'cloth manufactured by mills' within the meaning of the notification.

Cloth manufactured by means of power-looms does not fall within the term "cloth manufactured by the mills" so as to attract the higher tax in terms of the notification dated 8th June, 1948, issued under section 3-A of the U. P. Sales Tax Act, 1948.

It is common ground that if cloth was manufactured by looms worked by manual labour the notification was not applicable and the rate of tax per rupee was 3 pies in a rupee but if the cloth was manufactured by mills then the rate was to be 6 pies. Thus cloth has been divided broadly into two categories, mill-made and loom-made. It is quite obvious that loom-made cloth would include all cloth manufactured on looms. It is difficult to understand how the energy by which the looms are worked would make any difference. In other words, whether the energy is supplied manually or by power cannot convert the essential character of the cloth, namely, its manufacture on looms. In popular

language a power-loom cloth is never associated with a mill cloth

Sri Dhandapani Power-loom Factory v Commercial Tax Officer, 12 STC 304, approved

VK ———— *Appeal dismissed*

[SC NC 41]

G A Vaidialingam, Madan Lal Puri v A N Ray and Sains Das Berry D G Palekar JJ
27-7-1971 CA No 848 of 1971

Delhi Rent Control Act (LX of 1958), sections 39 (2) and 14 (1) Proviso, clause (e)—Scope of section 39 (2)—Finding by subordinate authorities as to whether requirement of landlord of his building for his own occupation was or was not *bona fide*—If can be interfered with by High Court under section 39 (2)

An inference drawn by the subordinate authorities that the requirement of the landlord of his building for his own occupation was not *bona fide*, within the meaning of section 14 (1) proviso (e) of the Delhi Rent Control Act, could not be regarded as conclusive. A finding on such an issue is not one of fact alone but is a finding on a mixed question of law and fact. Hence the High Court in proper cases has ample jurisdiction under section 39 (2) to interfere with that finding and record its own conclusion on the basis of the materials on record.

VK ———— *Appeal dismissed*

[SC NC 42]

J M Shelat, I D Dua, and Khagen Sarkar v SC Roy JJ
28-7-1971 State of West Bengal WP No 148 of 1971

Constitution of India (1950), Article 32—West Bengal (Prevention of Violent Activities) Act (1970), section 3—Detention order under—Interference with by Supreme Court—When justified

The satisfaction on the basis of which section 3 of the West Bengal (Prevention of Violent Activities) Act, enables the State Government or the District Magistrate as the case may be, to pass an order of detention is the satisfaction of the Government or the District Magistrate and not the satisfaction of the Supreme Court. The Act being one for preventive

detention the Supreme Court would not sit in appeal against the impugned order and therefore would not go into the sufficiency or otherwise of the materials for arriving at the satisfaction by the relevant authority under section 3. The Court would have however, no hesitation to interfere with such an order if, for instance, it were shown that the exercise of power under section 3 was *mala fide* or on grounds alien to the Act.

In the instant case the petitioner has adduced no materials which would show that the impugned order of detention was passed either *mala fide* or for the reasons alleged by him.

VK ———— *Petition dismissed*

[SC NC 43]

J M Shelat and Wopansao v A N Ray JJ
28-7-1971 N L Odyao CA No 1792 of 1970

(A) Representation of the People Act (XLIII of 1950), section 20 (5)—Effect

The effect of section 20 (5) is that statement of a member having service qualification that but for his having the service qualification he would have been ordinarily resident in a specified place on any date is to be accepted as correct in the absence of evidence to the contrary.

(B) Representation of the People Act (XLIII of 1950), section 20 (3)—Fiction under—Scope of

Under section 20 (3) a fiction is created that members having service qualification would be deemed to be ordinarily resident at the constituency in which but for their having such service qualification, they would have been ordinarily resident. The statutory fiction is intended to confer the right to be registered as electors at their home town or village but the fiction cannot take away the right of persons possessing service qualification to get themselves registered at a constituency in which they are ordinarily residing though such place happens to be their place of service.

VK ———— *Appeal dismissed*

by the execution of the deed, decided to open the temple to the public. He was a man with no family and could not have installed the deity for the members of his family. It was pointed out in that case that the deed was of such a recent date that evidence of subsequent conduct would not alter nature of the endowment as determined from the deed and that the decision was on a question of fact. Even if we were to treat it as a question of law, because whether the trust is public or private, partakes of both fact and law, and we are satisfied in the present case the evidence is entirely one-sided. There is not one circumstance to show that the endowment was public endowment, and this being the case, we do not see any reasons to differ from the decision already arrived at.

13. On the whole, we have not been able to discover any reason why we should depart from the unanimous opinion of the High Court and the Court below. Both the Courts are agreed that the oral evidence as well as the documents indicate only a private trust and that there is nothing to show that the endowment enjoyed a public character at any time. The cases before this Court, which were cited earlier are easily distinguishable.

14. The result is that the appeal fails. The High Court in its order did not award costs to the plaintiffs. The reasons given by the High Court for denying costs to the plaintiffs apply here also. We, accordingly, order that the costs shall be borne as incurred.

V.M.K.

*Appeal
dismissed.*

THE SUPREME COURT OF INDIA. (Civil Appellate Jurisdiction)

PRESENT:—*J. C. Shah, C.J., K. S. Hegde and A. N. Grover, JJ.*

D. P. Mishra .. Appellant*

v.

Kamalnayan Sharma and others .. Respondents.

(A) *Representation of the Peoples Act (XLIII of 1951), sections 99 (1) and 98—Corrupt practice—Person not a party to petition—Procedure.*

A person not a party to the petition cannot be named in the order, unless he has been given notice to appear before the Tribunal and to show cause why he should not be so named, and if he appears in pursuance of the notice, he has been given an opportunity of cross-examining any witness who has already been examined by the Tribunal and has given evidence against him of calling evidence in his defence and of being heard. [Para. 6.]

(B) *Constitution of India (1950), Article 136—Foreign Court holding corrupt practice not proved—Power of Supreme Court to re-appraise evidence—Scope.*

A proceeding for naming a person who is found responsible for publication of offending matter is in the nature of quasi criminal proceeding. [Para. 7.]

In an appeal against the order of the High Court holding on an appreciation of evidence that a person charged before the High Court is not proved to be guilty of corrupt practice, this Court does not normally proceed to reappraise the evidence, whether the High Court has misconceived the evidence or the conclusion is perverse, or so basically faulty that interference by this Court is attracted or the procedure adopted by the Court has resulted in miscarriage of justice or for similar reasons. This Court has jurisdiction in appropriate cases to disagree with the conclusion reached by the High Court, but the power to interfere is sparingly exercised. It is not exercised merely because this Court

* C.A. No. 1738 of 1969 (After notice to Mr. S. Shukla) 18th December, 1970.

may take on the evidence a different view. An appellate Court is reluctant to disregard the conclusion on matters of appreciation of evidence by the Court which had occasion to watch the demeanour of the witnesses examined before it and to substitute its own view thereon. Where the proceeding tried by the Court of first instance is of a quasi-criminal nature the reluctance of the appellate Court is greater. The question is not one of power or authority of the appellate Court, but of the respect and consideration due to the Court of first instance, and of the limit inherent in the exercise of the appellate functions [Paras 7 & 19]

(C) *Press and Registration of Books Act (XXV of 1867), section 7 and Representation of the Peoples Act, (XLIII of 1951), section 123 (4) —Presumption under section 7—Effect*

Section 7 raises a presumption that a person whose name is printed in a copy of the newspaper is the editor of every portion of that issue. The presumption may be rebutted by evidence. In a charge under section 123 (4) of the Representation of the People Act the presumption under section 7 of the Press and Registration of Books Act, 1967 would come with greater or less force according to circumstances to the aid of a person claiming that the Editor was responsible for the publication and that the publication was to the knowledge of the Editor.

[Para 11]

(D) *Press and Registration of Books Act (XXV of 1867), section 19 D (b)—Effect of annual report published by Press Registrar*

The annual report published by the Press Registrar being only for the information of the Government and not made under any statutory provision cannot displace the effect of a statutory provision made under section 19-D (b) of the Press and Registration of Books Act, 1867 [Para 14]

Appeal by Special Leave from the Judgment and Order, dated the 12th March 1969 of the Madhya Pradesh High Court in First Appeal No 49 of 1967

E C Agrawala, Advocate, for Appellant

M C Setalvad and S V Gupte, Senior Advocates (K A Chitale, U N Bachawat, Mrs A K Verma, Sreenivasa Rao, Advocates, and J B Dadachany,

Advocates of M/s J B Dadachany & Co with them), for S C Shukla

M C Chagla, Senior Advocate (R S Dabir, Advocate, Rameshwar Nath, Advocate of M/s Rajinder Narain & Co and Miss Suaranyit Sodhi, Advocate, with him), for Respondents Nos 3 and 4

The Judgment of the Court was delivered by

Shah, C J —In compliance with our order, dated 13th March, 1970, the High Court issued a notice to Shukla. Shukla submitted his reply contending, *inter alia* that he did not publish or cause to be published the offending statements in the newspaper "Mahakoshal" as alleged by Sharma. In paragraph (ii) he submitted that

"He learnt about their publication only after and during the pendency of the election petition for declaration of the election of Shri D P Mishra as void. The person in sole charge of the newspaper was Shri Vishnudatta Mishra 'Tarangi' whose name has been printed as the Editor. The declaration under Rule 8, Form VI prescribed under the Press and Registration of Books Act (XXV of 1867) for the year 1963 shows that the said Shri Vishnudatta Mishra 'Tarangi' and not the opposite party (Shukla) was the editor at the material time * * *. At the time of his appointment the said Shri Vishnudatta Mishra 'Tarangi' had insisted that there would be no interference by the opposite party (Shukla) in the conduct of the newspaper."

2 Several witnesses were examined before the High Court in support of the case that Shukla was instrumental in publishing and distributing the offending statements Annexures I, II and III in the daily newspaper "Mahakoshal" of which Shukla was the editor, printer and publisher. Some witnesses who had been previously examined were recalled for examination. Shukla and Tarangi were also examined at the hearing.

3 At the hearing of the appeal and in the proceedings for naming Shukla, Sharma the petitioner who instituted the election petition took no interest. But two persons who were permitted to

intervene in the proceeding took upon themselves the defence of the appeal and also to prosecute the proceeding after it stood remanded to the High Court.

4. The interveners submitted that Shukla had published the offending matter contained in Annexures I, II and III. They said that—(1) D. P. Mishra prepared the offending matter, read it over to Shukla and handed it over to him for publication and the same was published in the “Mahakoshal” and was widely distributed; (2) the copies of the newspaper containing the offending matter were personally distributed by Shukla; and (3) Shukla was the printer, publisher and editor of the newspaper and was the owner of the Printing Press in which the copies of the newspaper were printed, that he was attending to the publication of the newspaper and copies of the newspaper were supplied to him and that “Tarangi” had nothing whatever to do with the publication of the newspaper “Mahakoshal” at the relevant time.

5. The High Court on a review of the evidence was of the opinion that the case under the first and the second heads in support of the plea of the interveners was not proved. The High Court also held that even though the name of Shukla was printed in the newspaper “Mahakoshal” as the Chief Editor and that fact was printed in the report of the Press Registrar published for the information of the Government showing that Shukla was, between the years 1962 and 1965, the publisher, printer and editor of “Mahakoshal”, Shukla had in June, 1962 appointed Tarangi as editor of “Mahakoshal”, that Tarangi was in exclusive charge of the publication; that Shukla was not at the relevant time, when the offending matter was published, attending to the publication of “Mahakoshal”; that Shukla had no knowledge of the publication of the offending matter till it was brought to his notice in the course of the election petition; that Shukla was not proved to be the agent of Mishra and that even if it be held that he was the agent of Mishra, it was not proved that Mishra had given his consent to the publication of the offending matter in the “Mahakoshal”.

6. Section 123 (4) of the Representation of the People Act, 1951, provides:

“The publication by a candidate or his agent or by any other person, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, or retirement from contest, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate’s election”.

is a corrupt practice. Section 99 (1) requires the Tribunal in making an order under section 98 to record the names of all persons, if any, who are proved at the trial to have been guilty of any corrupt practice and the nature of that practice. But a person not a party to the petition cannot be named in the order, unless he has been given notice to appear before the Tribunal and to show cause why he should not be so named, and if he appears in pursuance of the notice, he has been given an opportunity of cross-examining any witness who has already been examined by the Tribunal and has given evidence against him, of calling evidence in his defence and of being heard.

7. A proceeding for naming a person who is found responsible for publication of offending matter is in the nature of a quasi-criminal proceeding. In an appeal against the order of the High Court holding on appreciation of evidence that a person charged before the High Court is not proved to be guilty of a corrupt practice, this Court does not normally proceed to reappraise the evidence, unless the High Court has misconceived the evidence or the conclusion is perverse or so basically faulty that interference by this Court is attracted or the procedure adopted by the Court has resulted in miscarriage of justice or for similar reasons. See *Amur Nath v. Lachman Singh and others*¹, *Jagdev Singh v. Pratap Singh*². Dr. M. Chenna Reddy v.

1. C.A. No. 1717 of 1968 decided on 23rd December, 1968.

2. (1964) 6 S.C.R. 750; A.I.R. 1965 S.C. 183.

*Ramchandra Rao and another*¹, and *Meghraj Patodia v R A Birla and others*²

8 Mr Chagla on behalf of the interveners contended that the conclusion of the High Court was perverse because the High Court had ignored important circumstances and evidence bearing on the question in dispute, and had reached a conclusion wholly inconsistent with normal probabilities. In dealing with this contention we may first eliminate matters in respect of which there is no serious controversy. Annexures I, II and III which constitute the offending matter were published in the newspaper "Mahakoshal" during the course of the election campaign of D P Mishra. The newspaper "Mahakoshal" was published from Raipur, and Shukla was registered as the Printer, Publisher and Editor in the record of the Press Registrar. The issues dated 12th April, 26th April and 4th May, 1963, were printed in the Mahakoshal Printing Press and were published and distributed. The matter published in those issues was in relation to the personal character and conduct of Sharma and in relation to his candidature. It was also a statement reasonably calculated to prejudice the prospects of Sharma's election.

9 Shukla admitted that the offending matter was published but claimed that it was printed in the Mahakoshal without his knowledge. He claimed that he had left the entire management of the newspaper with Tarangi and that he did not come to learn about the publication till the election petition was filed.

10 The High Court accepted the plea set up by Shukla that he did not know about the publication of the offending matter at or about the time when it was published. In support of the contention that Shukla was liable to be named, Mr Chagla relied upon section 7 of the Press and Registration of Books Act, 1867, upon certain proceedings in contempt taken before the High Court of Madhya Pradesh in which Shukla had admitted his responsibility in regard to the publication made some time in June, 1963 and also upon the service of

a notice upon Shukla by Sharma who filed the election petition requiring Shukla to disclose certain facts regarding the publication, upon the evidence that Shukla was closely associated with Mishra in carrying on the election campaign, and that the daily "Mahakoshal" carried on propaganda exclusively on behalf of Mishra and not of any other candidate. Counsel submitted that Shukla's denial could not be accepted as there was clear evidence that copies of the daily "Mahakoshal" were supplied at his residence at all relevant times and it is unlikely that he did not read them.

11 Section 7 of the Press and Registration of Books Act, 1867, in so far as it is relevant, provides

'In any legal proceeding whatever, * * the production of * *, in the case of the editor, a copy of the newspaper containing his name printed on it as that of the editor shall be held (unless the contrary be proved) to be sufficient evidence, as against the person whose name shall be * * printed on such newspaper * * that the said person was * * the editor of every portion of that is ue of the newspaper of which a copy is produced'

Section 7 raises a presumption that a person whose name is printed in a copy of the newspaper is the editor of every portion of that issue. The presumption may be rebutted by evidence. In the copies of "Mahakoshal" dated 12th April, 26th April, and 4th May, 1963 it was printed that Shukla was the Chief Editor. Shukla was also described as the printer and publisher of the newspaper. The presumption under section 7 of the Press and Registration of Books Act, undoubtedly arises, but in a charge under section 123 (4) of the Representation of the People Act the presumption under section 7 of the Press and Registration of Books Act, 1867, would come with greater or less force, according to the circumstances to the aid of a person claiming that the editor was responsible for the publication and that the publication was to the knowledge of editor.

12 Tarangi in his evidence has stated that he was working between June, 1962 to January, 1964 as editor of "Mahakoshal" and that he was in sole

¹ C.A.No 1149 of 1968 decided on 17th December 1968

² C.A.No 1094 of 1969 decided on 10th September 1970

charge of the newspaper including its management, and that he was solely responsible for editing, printing and publishing the newspaper, and that he had made a special condition when accepting his appointment as editor that he would be in sole charge of managing and editing the newspaper. He said that Shukla never visited the office of Mahakoshal during the period of his management; that he—Tarangi—wrote Annexures I, II and III and got them printed and published, that he had written them by himself on information which he received, and not at the instance of any other person, that he had not obtained the consent of Shukla before writing or publishing the offending matter, and that when he heard the matter contained in those articles he thought that it had news value and he printed and published it. He also stated that Shukla was not informed of the offending matter.

13. Tarangi had printed on 1st March, 1963, a statement in the Daily Issue of Mahakoshal that he was the editor. That is clear from Annexure A. It was urged by Mr. Chagla that Shukla, to conceal his activities in the course of the elections which it was expected would take place in the near future, made a mere appearance of printing the name of Tarangi as editor, while in fact he remained the editor and in charge of management of the Mahakoshal. But it is clear from the issues of the Mahakoshal daily dated 11th July, 16th July, 30th July, 31st July 24th September, 12th October, and 18th October, 1962, that on the title page Tarangi was shown as the editor of the newspaper. The story that Tarangi was placed in charge of the newspaper Mahakoshal between June, 1962 and January 1964 is amply supported by copies of the Mahakoshal produced in the Court. It is not in dispute that the publication of the newspaper Mahakoshal which contained the offending Annexures I, II & III it was published that Tarangi was the editor.

14. Shukla stated in this evidence that he had left Tarangi in sole management of the newspaper, that during the months of April and May 1963, he visited his house at Raipur only once, and that he had no occasion to read the previous issues of the Mahakoshal. Shukla said

that he was moving about from place to place during that period. The High Court has accepted that testimony and we see no reason to disagree with the same. Annexure A on which reliance is placed was made pursuant to section 19-D (b) of the Press and Registration of Books Act, 1867. There was no attempt to prove that the return submitted before the Press Registrar differed from the return published under section 19-D (b). Section 19-K (c) makes it an offence for the publisher of any newspaper to publish in pursuance of clause (b) of section 19-D any particulars relating to the newspaper which he has reason to believe to be false. Mr. Chagla contended that Shukla should have taken steps to produce before the High Court the original return or at any rate a copy of the return filed before the Press Registrar. We do not think that in the circumstances of the case any such obligation lay upon Shukla. If it was the case of the interveners that the statement in Annexure A was not consistent with the return made to the Press Registrar they could have summoned the Press Registrar or a member of his Office with the original return. But that was not done. It is true that in the annual report published by the Press Registrar for the use of the Central Government for the years 1963, 1964 and 1965 Shukla alone is shown as the editor of Mahakoshal and the name of Tarangi is not at all mentioned. But the annual report of the Press Registrar which contains hundreds of entries is secondary evidence of the contents of the return. There is no reason why, when the interveners have made no attempt to have the original return produced, we should accept the annual report as probative of the fact that Tarangi's name was not mentioned in the return submitted to the Press Registrar. The annual report is only for the information of the Government and a mere summary in the annual report, to which the Legislature has not attached any importance and which is not made under any statutory provision, cannot be regarded as displacing the effect of a statutory provision made under section 19-D (b) of the Press and Registration of Books Act, 1867.

15. Granting that there was close association between Mishra and Shukla and even granting that Mahakoshal was

exclusively carrying on propaganda on behalf of Mishra, unless there is evidence to prove that Shukla had either authorised the publication of the offending matter, or had undertaken to be responsible for all the publications made in the Mahakoshal, no inference that the offending publications were made to the knowledge and with the consent of Shukla may be raised

16 Strong reliance was placed by Mr Chagla upon two circumstances (i) that in certain proceedings taken in the High Court for committing the editor of Mahakoshal for contempt of Court for publishing in June 1962 certain scurrilous matter concerning a Civil Judge, Shukla admitted his responsibility for the publication and tendered apology, and (ii) that Shukla did not send any reply to the notice served by Sharma, and published no repudiation

17 The circumstances in which the proceeding for commitment for contempt of Court was started may first be set out. On 16th June, 1963 a news item defamatory of one R. P. Awasthy, Civil Judge, was published in Mahakoshal. The District and Sessions Judge, Bilaspur, submitted the papers relating to the publication, to the High Court of Madhya Pradesh with a report that one Dr Saraf Baloda, a correspondent of the newspaper was responsible for the publication, and recommended that proceeding be started for committing for contempt, Saraf and the editor, printer and publisher of the newspaper. A notice was issued to the editor, printer and publisher of Mahakoshal. Shukla appeared before the High Court and admitted that he was the Chief Editor of the paper, but he stated that the day-to-day work was done by the Sub-editors, that he used to lay down the principle and policy of the paper and also gave general directions, that the news item received from correspondents from various places was scrutinised by the Sub-editors and the Sub-editors that on 16th June 1963 they did not understand the implications of the offending news item and published it and that when it came to his (Shukla's) notice he immediately published a contradiction and expressed his regret. He said that being the Chief Editor he accepted his responsibility. He submitted that

since amends had been made soon after the facts came to his notice, his apology to the "concerned officer and assuring him that no item will be published from the correspondent" be accepted. In view of this apology no action was taken against him by the High Court. The statement filed by Shukla is not inconsistent with the case set up by him in this proceeding. Responsibility for publication was accepted by him but he had clearly stated that the publication of news-items from the correspondents were attended to by the Sub-editors and that he generally laid down the policy of the newspaper and gave general directions. He admitted his responsibility because he was the Chief Editor, and not because he personally had, with knowledge published the article which constituted contempt of Court.

18 On 24th October, 1963, Sharma addressed a letter to Shukla as printer, publisher and editor of Mahakoshal inviting his attention to the three Annexures I, II and III, dated 12th April, 26th April, and 4th May, 1963 and calling upon Shukla to "disclose the full identity of the writer within three days of his receiving the letter". He intimated that in case Shukla failed to comply with the request he would assume that Shukla was the author of the publications, and would take suitable legal action. No reply was sent to this letter. Nor did Shukla publish any repudiation that it was without his knowledge that the matter was published. Shukla has in his evidence stated that after receiving the letter he consulted his lawyer, and he was "advised that reply was not necessary" and it "was not proper to send a reply". He stated that he remembered that his Counsel advised him that since he was "involved in the petition" he should not act on the letter. These matters were elicited in cross-examination by Counsel for the interveners. Mr Chagla submitted that the testimony of Shukla in this behalf may not be accepted, because the lawyer had not been examined as a witness and even his name was not disclosed. But the matter was not probed further by the cross-examiner nor was any question asked which would suggest that any doubt was sought to be thrown on the testimony of Shukla that he acted on the advice given by his lawyer. It is true

that no repudiation of Annexures I, II and III was published in the Mahakoshal, even after the letter was received from Sharma. But it must be remembered that in June, 1963 an election petition was filed for setting aside the election of Mishra and in paragraph 5 it was asserted that Annexures I, II and III were published in the newspaper Mahakoshal of which Shukla was the printer, publisher and editor. It was further asserted that Shukla was the agent of Mishra. If the story of Shukla that till October, 1962, he was not aware of the offending publications and he came to know of the publications for the first time he accepted, failure to repudiate the publications after the election petition was filed, will not, in our judgment, lead to an inference against Shukla that he was responsible for the publications.

19. We have carefully considered the evidence and the circumstances, and we do not think that a case is made out justifying us in taking a view different from the view of the High Court. The proceeding before us is quasi-criminal in character, and this Court will not normally disagree with the view of the High Court, where the High Court has reached, on appreciation of evidence, the conclusion that the corrupt practice charged against a person is not proved. This Court has jurisdiction in appropriate cases to disagree with the conclusion reached by the High Court, but the power to interfere is sparingly exercised. It is not exercised merely because this Court may take on the evidence a different view. An Appellate Court is reluctant to disregard the conclusion on matters of appreciation of evidence by the Court which had occasion to watch the demeanour of the witnesses examined before it, and to substitute its own view thereon. Where the proceeding tried by the Court of First Instance is of a quasi-criminal nature, the reluctance of the Appellate Court is greater. The question is not one of power or authority of the Appellate Court, but of the respect and consideration due to Court of First Instance, and of the limit inherent in the exercise of the appellate functions.

20. The order passed by the High Court is confirmed. Having regard to the circumstances of the case, there will be

no order as to costs of the proceeding against Shukla. The appeal filed by Mishra will be dismissed. Since the original applicant Sharma did not appear in this Court, there will be no order as to costs in the appeal.

S.V.J. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA (Civil Appellate Jurisdiction.)

PRESENT:—*J. C. Shah, C.J., K. S. Hegde and A. N. Grover, JJ.*

The State of Punjab ... *Appellant**
v.

Hira Lal and others ... *Respondents.*

Constitution of India (1950), Article 16 (1) and (4)—Promotion Posts—Reservation to scheduled castes and tribes—Validity—Reservation whether offends Article 16 (1)—Burden of proof.

The extent of reservation to be made is primarily a matter for the State to decide. By this it cannot be said that the decision of the State is not open to Judicial review. The reservation must be only for the purpose of giving adequate representation in the services to the Scheduled Castes, Scheduled Tribes and Backward classes. The exception provided in Article 16 (4) should not make the rule embodied in Article 16 (1) meaningless. But the burden of establishing that a particular reservation made by the State is offence of Article 16 (1) is on the person who takes the plea. The mere fact that the reservation made may give extensive benefit to some of the persons who have the benefit of the reservation does not by itself make the reservation bad. The length of the leap to be provided depends upon the gap to be covered. It is true that every reservation under Article 16 (4) does introduce an element of discrimination particularly when the question of promotion arises. It is an inevitable consequence of any reservation of posts that junior officers are allowed to take a march over their seniors. This circumstance is bound to displease the

senior officers. It may also be that some of them will get frustrated but then the Constitution makers have thought fit in the interests of the society as a whole that the backward class of citizens of this country should be afforded certain protection [Paras 10 and 11]

Reservation of appointments under Article 16 (1) cannot be struck down on hypothetical grounds or imaginary possibilities. He who assails the reservation under that Article must satisfactorily establish that there has been a violation of Article 16 (1) [Para 12]

The General Manager, Southern Railway v Rangachari, (1962) 2 S C R 586 (1961) 2 S C J 424, followed

Appeal from the Judgment and Order dated the 29th November, 1966 of the Punjab High Court in Civil Writ No 271 of 1966

M C Setalvad, Senior Advocate, (*R N Sachthy*, Advocate with him), for Appellant

The Judgment of the Court was delivered by

Hegde, J—On 12th September, 1963, the Government of Punjab passed the following order

“Subject Reservation for the members of Scheduled Castes, Scheduled Tribes and Backward Classes in promotion cases

Sir,

I am directed to refer you to the subject noted above and to say that at present reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes is applicable to new appointments and not to promotions which are governed by consideration of merit and seniority alone. Since those castes/classes are poorly represented in various services in the upper grades under the State Government it has been under the active consideration of Government that some reservation in higher grade posts as well should be made for them. It has now been decided that except in the case of All India Services 10 per cent of the higher posts to be filled by promotion should be reserved for the members of Scheduled Castes, Scheduled Tribes and Backward Classes (9 per

cent for the members of Scheduled Castes and Scheduled Tribes and 1 per cent for the Backward Classes) subject to the following conditions

(a) the persons to be considered must possess the minimum necessary qualification, and

(b) they should have at least a satisfactory record of service”

2 Up till that date reservation for Scheduled Castes, Scheduled Tribes and Backward Classes was confined to initial recruitment. The first out of every five initial recruitments was reserved for Scheduled Castes, Scheduled Tribes or other Backward Classes

3 On 14th January, 1964, the Government clarified its order dated 12th September, 1963. In this case we are not concerned with the first paragraph of that clarification. The second paragraph of that clarification reads thus

“Government have since then been receiving references from several quarters seeking clarification in regard to the implementation of the said decision. After careful consideration of the matter, it has now been decided that—

(a) The said decision should be applied to all promotion posts already vacant on 12th September, 1963, or falling vacant thereafter

(b) The reservation should not imply that 10 per cent of the total posts reserved for promotion in any cadre have to be filled by Scheduled Castes personnel in the sense that all existing/future vacancies will be filled up by Scheduled Castes/Tribes and other Backward Classes candidates until their share in higher services comes up to 10 per cent

(c) This provision of reservation applies to all State services including Classes I, II, III and IV posts the only exception being All India Services

(d) This reservation should apply even in the case of short term leave vacancies unless it is likely to involve unnecessary dislocation of work in different offices and avoidable expenditure and inconvenience due to mid year transfers etc

(e) So far as Scheduled Castes/Tribes are concerned, the very first vacancy existing on/arising after the 12th September, 1963, should be treated as reserved for them and only if no such official is available for promotion against the vacancy reserved for them in the first block, of 10 vacancies, a candidate belonging to other Backward Classes may be selected in preference to the remaining officials against one such post only out of one hundred, since the reservation for other Backward Classes may not exceed 1 per cent. However, if Scheduled Castes/Tribes candidates are available to fill one out of a every ten vacancies, the specific reservation in favour of other Backward Classes should be the 51st vacancy.

(f) One reserved vacancy should be carried over to the next block of ten vacancies in case it cannot be filled up within any block of ten posts. Thus if no Scheduled Castes/Tribes/Backward Classes candidate is promoted against any of the first 10 vacancies the number of vacancies available to such candidates in the following block will be two.

(g) In case an out of turn promotion has already been given to a candidate belonging to Scheduled Castes/Tribes or Backward Classes against a reserved vacancy and then in the same block it happens to be the turn of a candidate belonging to the said castes/classes for promotion, such candidate should not be ignored on the ground that 10 per cent. reservation has already been exhausted.”

4. Thereafter by another letter of 18th March, 1964 the Government issued further clarification of their aforementioned communications. That clarification reads:

“To illustrate the above point if there is an official of the Scheduled Castes placed at a position say 73rd in a list prepared for promotion to the higher posts and a vacancy arises therein he would have precedence over the other 72 officials to benefit out of the first vacancy that occurs on or after 12th September, 1963. His turn would not be withheld merely for the fact that this number on the select list is not in the first ten.”

5. Respondents Nos. 1 and 3 to this appeal were both working in the Forest

Department of the Government as Head Assistants. Respondent No. 1 was senior to Respondent No. 3, Respondent No. 3 belonged to a Scheduled Caste. Hence in view of the order of the Government, Respondent No. 3 was promoted temporarily as Superintendent ignoring the claim of Respondent No. 1. Aggrieved by that order Respondent No. 1 moved the High Court of Punjab to quash the promotion of Respondent No. 3 and direct the Government to promote him as Superintendent in the place of Respondent No. 3. The High Court has quashed the promotion of Respondent No. 3. The State of Punjab (now substituted by the State of Haryana) has brought this appeal after obtaining a certificate from the High Court under Article 133 (1) (c) of the Constitution.

6. In the opinion of the High Court reservation made for the Scheduled Castes, Scheduled Tribes and Backward Classes is not impermissible under the Constitution in view of Article 16 (4) of the Constitution as interpreted by this Court in *The General Manager, Southern Railway v. Rangachari*¹. But the Government has violated Article 16 (1) by reserving the first out of a group of 10 posts for the Scheduled Castes, Scheduled Tribes and Backward Classes. The High Court was persuaded by the Counsel for the first respondent to visualise various hypothetical cases under which reservation of the type impugned in the present case could lead to various anomalies such as the person getting the benefit of the reservation may jump over the heads of several of his seniors not only in his own grade but even in the higher grades. They visualised the possibility of a Head Assistant leaping over the heads of several seniors of his in the grade of Head Assistants and thereafter in the grade of Superintendent; subsequently in the grade of Under Secretaries, Deputy Secretaries and so on and so forth. It is not the finding of the High Court that in any of the grades to which the impugned orders apply, the possibilities visualised by the High Court are imminent or even likely.

7. Article 16 (1) is an extension of Article 14. It provides:

1. (1961) 2 M.L.J. (S.C.) 71: (1961) 2 A.W.R. (S.C.) 71: (1961) 2 S.C.J. 424 (1962) 2 S.C.R. 586.

"There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State"

8 But the equality contemplated by this clause is not an embodied equality. It is subject to several exceptions and one of the exceptions is that provided in Article 16 (4) which says

"Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State is not adequately represented in the services under the State"

9 In *Rangachari's case*¹ this Court ruled that the reservation contemplated by Article 16 (4) can be made not merely to initial recruitment but also to posts to which the promotions are to be made. This is what Gajendragadkar, J., (as he then was) speaking for the majority observed (at spl pages 604 and 605)

"We must in this connection consider an alternative argument that the word 'posts' must refer not to selection posts but to posts filled by initial appointments. On this argument reservation of appointments means reservation of certain percentage in the initial appointments and reservation of posts means reservation of initial posts which may be adopted in order to expedite and make more effective the reservation of appointments themselves. On this construction the use of the word 'posts' appears to be wholly redundant. In our opinion, having regard to the fact that we are construing the relevant expression 'reservation of appointments' in a constitutional provision it would be unreasonable to assume that the reservation of appointments would not include both the methods of reservation, namely, reservation of appointments by fixing a certain percentage in that behalf as well as reservation of certain initial posts in order to make the reservation of appointments more effective. That being so this alternative argument which confines the word 'post' to initial posts seems to us to be entirely unreasonable—On the other

hand under the construction by which the word, 'posts' includes selection posts in the use of the word 'posts' is not superfluous but serves a very important purpose. It shows that reservation can be made not only in regard to appointments which are initial appointments but also in regard to selection posts which may fall to be filled by employees after their employment. This construction has the merit of interpreting the word 'appointments' and 'posts' in their broad and liberal sense and giving effect to the policy which is obviously the basis of the provisions of Article 16 (4). Therefore, we are disposed to take the view that the power of reservation which is conferred on the State under Article 16 (4) can be exercised by the State in a proper case not only by providing for reservation of appointment, but also by providing for reservation of selection posts. This construction, in our opinion, would serve to give effect to the intention of the Constitution makers to make adequate safeguard for the advancement of backward classes and to secure for their adequate representation in the service"

10 The extent of reservation to be made is primarily a matter for the State to decide. By this we do not mean to say that the decision of the State is not open to judicial review. The reservation must be only for the purpose of giving adequate representation in the services to the Scheduled Castes, Scheduled Tribes and Backward Classes. The exception provided in Article 16 (4) should not make the rule embodied in Article 16 (1) meaningless. But the burden of establishing that a particular reservation made by the State is offensive to Article 16 (1) is on the person who takes the plea. The mere fact that the reservation made may give extensive benefits to some of the persons who have the benefit of the reservation does not by itself make the reservation bad. The length of the leap to be provided depends upon the gap to be covered. As observed by the majority in *Rangachari's case*¹

¹ (1961) 2 M.L.J. (S.C.) 71 (1961) 2 A.W.R. (S.C.) 71 (1961) 2 S.C.J. 424 (1962) 2 S.C.R. 586

¹ (1961) 2 M.L.J. (S.C.) 71 (1961) 2 A.W.R. (S.C.) 71 (1961) 2 S.C.J. 424 (1962) 2 S.C.R. 586

"The condition precedent for the exercise of the powers conferred by Article 16 (4) is that the State ought to be satisfied that any backward class of citizens is not adequately represented in its services. This condition precedent may refer either to the numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation. The advancement of the socially and educationally backward classes requires not only that they should have adequate representation in the lowest rung of services but that they should aspire to secure adequate representation in selection posts in the services as well. In the context the expression "adequately represented" imports considerations of "size" as well as "values", numbers as well as the nature of an appointment held and so it involves not merely the numerical test but also the qualitative one. It is thus by the operation of the numerical and a qualitative test that the adequacy or otherwise of the representation of backward classes in any service has to be judged; and if that be so, it would not be reasonable to hold that the inadequacy of representation can and must be cured only by reserving a proportionately higher percentage of appointments at the initial stage. In a given case the statement may well take the view that a certain percentage of selection posts should also be reserved, for reservation of such posts may make the representation of backward classes in the services adequate, the adequacy of such representation being considered qualitatively."

11. It is true that every reservation under Article 16 (4) does introduce an element of discrimination particularly when the question of promotion arises. It is an inevitable consequence of any reservation of posts that junior officers are allowed to take a march over their seniors. This circumstance is bound to displease the senior officers. It may also be that some of them will get frustrated but then the Constitution makers have thought fit in the interests of the society as a whole that the backward class of citizens of this country should be afforded certain protection—as observed by this

Court in *Minor A. Peeriakaruppan etc. v. State of Tamil Nadu*¹.

"It cannot be denied that unaided many sections of this country cannot compete with the advanced sections of the Nation. Advantages secured due to historical reasons should not be considered as fundamental rights. Nation's interest will be best served taking a long range view—if the backward classes are helped to march forward and take their place in line with the advanced sections of the people."

12. There was no material before the High Court and there is no material before us from which we can conclude that the impugned order in violation of Article 16 (1). Reservation of appointments under Article 16 (4) cannot be struck down on hypothetical grounds or on imaginary possibilities. He who assails the reservation under that Article must satisfactorily establish that there has been a violation of Article 16 (1).

13. For the reasons mentioned above this appeal is allowed and the order of the High Court set aside. Respondent No. 1 who was the petitioner before the High Court is not represented before this Court. In the circumstances of this case we make no order as to costs.

S.V.J. ————— Appeal allowed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT —S.M. Sikri, V. Bhargava and I.D. Dua, JJ.

Municipal Board, Nainital and another
.. Appellants*

v.

Brij Mohan Chandra and another
.. Respondents.

U.P. Municipalities Act (II of 1916), section 128 (1) (vii) and rules framed under section 296 read with section 153 (a) of the Act—Interpretation—Toll on the vehicle entering the municipality—Toll, if could be realised from the passengers carried by the vehicle.

1. W.P. Nos 285 and 314 of 1970, decided on 23rd September, 1970.

*Crl. A. No 134 of 1968.

26th October, 1970.

On the question whether under section 128 (1) (vii) of the Uttar Pradesh Municipalities Act II of 1916, the toll imposed on the vehicle entering the municipality could legally be realised from the passengers carried by it because of their nexus with the entry of the vehicle—

Held Clause (vii) of section 128 (1) in clear and unambiguous terms speaks of a toll on vehicles and other conveyances, animals and laden coolies entering the municipality. It does not take within its fold the passengers carried by vehicles to be taxed. It is noteworthy that under the rules made under section 296 read with section 153 (a) of the Act, the toll imposed on the laden vehicles is expressly made payable by the person in-charge of such vehicles and according to the scheme of the rules which provide the procedure for collecting such tolls, the person bringing the vehicle within the municipal limits (who is supposed to be the person in-charge) is enjoined to permit examination of the face value ticket when demanded after vehicles entry into those limits. No liability has been fixed on the passengers for payment of the tax imposed on the vehicles carrying them and entering the Nainital Municipality. The liability for payment of such tax having been fixed only on the person in-charge of the vehicle and not on the passengers it is difficult to appreciate how the authorities entrusted with the duty of realising the same can demand it from the passengers. [Paras 4 and 5]

Appeal from the Judgment and Order dated the 15th April, 1968 of the Allahabad High Court in Criminal Misc Case No 3403 of 1967

Yogeshwar Prasad, Advocate, for Appellant

O P Rana Advocate, for Respondent No 2

The Judgment of the Court was delivered by

Dua J—The short point requiring determination in this appeal on certificate of fitness granted by the Allahabad High Court under Article 134 (1) (c) of the Constitution is whether toll tax on laden motor vehicles levied under section 128 (1) (vii) of the U P Municipalities Act II of 1916 (hereinafter described as the Act)

on their entry within the limits of Nainital Municipality can be realised from the passengers carried by them

2 The relevant facts which lie within a narrow compass may now be briefly stated. Brij Mohan Chandra, Vice President of the Notified Area Committee, Bhowali, District Nainital (respondent No 1 in this Court) travelled in U P Government Roadways Bus from Bhowali to Nainital on 17th, 26th and 29th May 1967. At Kaila Khan Municipal toll barrier one and a half miles from Nainital on the Bhowali Nainital Road, toll tax was demanded from him but he declined to pay. The Executive Officer, Municipal Board, Nainital, thereupon filed a complaint against him under section 190 (1) (c) of the Code of Criminal Procedure on the allegation that he had by entering the municipal limits of Nainital without paying the toll dues committed breach of rule (1) of the rules made under section 153 (a) of the Act for the assessment and collection of tolls within the municipality of Nainital. Brij Mohan Chandra's contention in reply was that the levy of toll tax by the Municipal Board on passengers was *ultra vires* the taxing power of the Board. During the pendency of the proceedings in the Court of Sub Divisional Magistrate, Nainital, Brij Mohan Chandra applied to the High Court of Judicature at Allahabad under section 561-A Criminal Procedure Code, for quashing those proceedings. The High Court (S D Singh, J) on 16th April, 1968, quashed the proceedings by the impugned order holding that clause (vii) of section 128 (1) of the Act did not authorise levy of toll tax on passengers and that the relevant notification also levied tax only on vehicles and not on passengers. The rule imposing an obligation on the passengers to pay the toll was, therefore, struck down as *ultra vires*.

3 In this Court Shri Yogeshwar Prasad, learned Counsel for the appellants (the Municipal Board, Nainital and the Executive Officer of the Board) at the outset attempted obliquely to seek support for the validity of the levy on passengers from clause (xiv) of section 128 (1) as pleaded in the memorandum of appeal lodged in this Court under Order 21, rule 12 of the Supreme Court Rules. But this attempt was soon abandoned and Shri Yogeshwar Prasad felt constrained to

concede that in view of the clear and precise position taken on behalf of the Board in the High Court that it had never been intended to impose toll-tax on passengers, it was not open to him in this Court to rely on clause (xiv). Shri O.P. Rana, the learned Counsel for the respondent State of Uttar Pradesh supporting the appeal, also did not rely on clause (xiv). We, therefore, do not propose to express any opinion on the question whether or not a toll-tax on passengers would be permissible under clause (xiv).

4. The only point seriously pressed on behalf of the appellants as also by Shri O.P. Rana on behalf of the State of Uttar Pradesh was that the toll imposed on the vehicle entering the municipality could legally be realised from the passengers carried by it because on their nexus with the entry of the vehicle. Before examining this contention we may in passing turn to clause (vii) of section 128 (1) of the Act which reads :

"128 (1). Subject to any general rules or special orders of the State Government, in this behalf, the taxes which a board may impose in the whole or part of a municipality are—

* * * *

(vii) a toll on vehicles and other conveyances, animals and laden coolies entering the municipality ;

* * * *

This clause in clear and unambiguous terms speaks of a toll on vehicles and other conveyances, animals and laden coolies entering the municipality. It does not take within its fold the passengers carried by vehicles to be taxed, with the result that imposition of tax on passengers by the Municipal Board would be incompetent under this clause. And this in fact was not disputed at the Bar.

5. The argument of nexus was also raised in the High Court; but it was repelled by that Court which observed as follows:

"It was urged that when a tax on conveyance is levied, some provision has to be made for the assessment and collection of that tax and some provision made about the persons from whom that tax may be recovered and that if there is any reasonable or rational nexus between the levy of the tax and the

persons from whom that tax may be recovered, the Municipal Board would be within its rights to realise the tax from the persons so named. It is difficult, however, to apply the nexus theory in a manner so as to enable the Municipal Board to recover the toll-tax from the passengers travelling in a bus otherwise there will be no distinction left between a vehicles-tax and a passenger tax. When a toll-tax is levied on a vehicle, it is levied at the point of its entry within the municipal limits. It is obviously, therefore, the person, who is in charge of the vehicle or who makes an attempt to take the vehicle inside the municipal limits, who, takes upon himself the responsibility for the payment of the toll-tax. There is no question of there being any nexus between the levy of the tax on the vehicle and the persons sitting inside the same. In the case of vehicles plying on hire the driver or conductor of the vehicle can, of course, charge the amount of tax which has to be paid, from the passengers in addition to the fare which is normally charged from them."

The same argument was repeated before us. The submission seems to be based largely on the policy of the law to ensure the collection of taxes by preventing fraudulent evasion. In order to appreciate its cogency we may appropriately advert to the Rules made by the State Government in 1922 under section 296 read with section 153 (a) of the Act, with respect to the assessment and collection of tolls in the Nainital Municipality. So far as relevant for the purposes of this appeal, according to rule (1), no person can bring within the limits of the Nainital Municipality any vehicle in respect of which the toll-tax imposed under section 128 (1) (vii) of the Act is leviable until the toll due in respect thereof has been paid to such *muharrir* and at such barrier as the Board may from time to time appoint. Under rule 2 (a), in the case of laden motor vehicles the load recorded in the chalan or invoice accompanying the vehicle has to be accepted by the *muharrir* for purposes of assessing the toll. If no chalan or invoice accompanies the vehicle the load is to be assumed for the purposes of assessment to exceed three maunds unless it is ascertained to be less by weighment undertaken at the

request of the person in-charge of the vehicle. The toll on a laden motor vehicle has to be paid by the person in-charge of the vehicle and toll on a passenger is to be paid by the passenger. Rule 2 (b) provides that when any person in-charge of a laden vehicle enters the municipal limits such person shall pay the toll to the *muharrir* at the barrier and the *muharrir* shall tender a face value-ticket with coupon attached for the amount to the person paying the toll. This face value ticket can be examined by the official appointed for the purpose and the person bringing the vehicle within the municipal limits is bound under rule 3 to permit such examination. Under rule 2 (c) every driver of a motor lorry or other vehicle plying for hire and every driver of a private motor car or vehicle carrying passengers or goods has to stop his lorry or vehicle at the toll barrier for a reasonable time to enable the toll staff to recover proper toll tax from passengers and on the goods loaded therein. The provision contained in rule 2 (a) that the toll on a passenger shall be paid by the passenger, on which reliance has principally been placed, is of no assistance to the appellants because it postulates imposition of toll on passengers and, therefore, unless a toll has been imposed on passengers none can be demanded from them under this clause. Similarly the notification (No. 1450/XI 476-E) dated 19th August 1921, according to which toll tax under section 128 (1) (iii) of the Act sanctioned by the Uttar Pradesh State Government under section 135 (2) of the Act is levied on motor vehicles other than cars at the rate of Re. 1 per passenger carried by them and at the rate of Rs. 2 per vehicle is unhelpful to the appellants. As already observed by us no toll tax has been imposed on passengers and indeed it was conceded on behalf of the appellants, both here and in the High Court that the Board has never intended to impose a tax on passengers. It is also noteworthy that the toll imposed on the laden vehicles is expressly made payable by the person-in-charge of such vehicles and according to the scheme of the rules which provide the procedure for collecting such tolls the person bringing the vehicle within the municipal limits (who is supposed to be the person in-charge) is enjoined to permit

examination of the face-value ticket when demanded after the vehicles' entry into those limits. No liability has been fixed on the passengers for payment of the tax imposed on the vehicles carrying them and entering the Nainital Municipality. The liability for the payment of such tax having been fixed only on the person in-charge of the vehicle and not on the passengers it is difficult to appreciate how the authorities entrusted with the duty of realising the same can demand it from the passengers. Our attention was not invited to any provision of law under which the passengers can be held liable to pay the toll tax imposed on the vehicles. Neither any precedent nor any principle was cited at the Bar in support of the submission that merely because the passengers were carried by the vehicles the toll tax imposed on the entry of the vehicles into the municipal limits could be demanded from them. On the facts and circumstances of this case and on the arguments addressed we are, therefore, unable to hold that the passengers carried by the vehicles entering the municipality of Nainital can be legally called upon to pay the tax imposed on the vehicles.

6 As a last resort a faint attempt was made by the appellants' counsel to rely on section 164 of the Act in bar of the jurisdiction of the High Court in entertaining the petition under section 561 A, Criminal Procedure Code and in holding the impugned assessment and liability of the passengers to be unauthorised and illegal. This argument ignores the vital point that if the impugned levy is outside the Act then this section cannot operate and the jurisdiction of the High Court to quash the proceedings relating to the levy which is *ultra vires* the taxing power of the Board under the Act cannot be taken away to the prejudice of the aggrieved citizen. This submission is accordingly repelled.

7 In the final result this appeal fails and is dismissed.

V M K.

Appeal dismissed

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—*M. Hidayatullah, C.J., J.M. Shelat, V. Bhargava, G.K. Mitter, C.A. Vaidalingam, A.N. Ray and I.D. Dua, JJ.*Madhu Limaye and others ... *Petitioners**

v.

Sub-Divisional Magistrate, Monghyr and others ... *Respondents.*

The Attorney-General for India and another ... (By notice)

Sajiwan Lal and 7 others ... *Interveners;*(A) *Constitution (First Amendment) Act (1951)*
—*Purpose and effect.*

Assuming that the Constitution could be amended with retrospective effect (a point not free altogether from difficulty), the purpose of the Constitution (First Amendment) Act (1951) is to create a fiction. Whatever may be said of a law declared unconstitutional before the First Amendment, cannot be said of a law which is being considered today after the First Amendment. The fiction in the amendment is to make the Constitution be read with the new clause and no other and a law restricting the freedoms in the interests of public order (among others) or in the interests of the general public must be held to be saved, not as a result of the amendment but because of these available restrictions operating from the inception of the Constitution. Therefore although we consider the matter today after much history has been written and then unwritten by retrospective amendments of the Constitution (assuming this to be permissible), we read the protection of amended clause (2) of Article 19 as available from 26th January, 1950, without a break. The fiction, if given full effect leads to no other conclusion.

[Para. 5.]

(B) *Constitution of India (1950), Article 19—Pre-Constitution laws—Challenge to validity as offending fundamental freedoms—Presumption and burden of proof.*

The result of the doctrine of preferred position for the Fundamental rights developed by the Roosevelt Court in America was to shift the burden of proof on the shoulders of those defending the legislation without raising in their favour the presumption of the validity of the legislation. It has, however, been abandoned by the majority of Judges after 1949 and to day the preferred position doctrine has not the support of the Supreme Court of the United States and the reasonableness of the law has to be established]

[Para 10.]

In the Supreme Court of India the preferred position doctrine has never found ground although vague expressions such as 'the most cherished rights', 'the inviolable freedoms' sometimes occur. But this is not to say that any one fundamental right is superior to the other or that Article 19 contains a hierarchy. Pre-constitution laws are not to be regarded as unconstitutional. We do not start with the presumption that being a pre-constitution law, the burden is upon the State to establish its validity. All existing laws are continued till the Supreme Court declares them to be in conflict with a fundamental right and therefore void. The burden must be placed on those who contend that a particular law has become void after the coming into force of the Constitution by reason of Article 13 (1) read with any of the guaranteed freedoms. [Para. 11.]

(C) *Constitution of India (1950), Article 19 (2), (3), (4) and (5)—“In the interest of public order”—Meaning of.*

The words 'public order' and 'public tranquillity' overlap to a certain extent but there are matters which disturb public tranquillity without being a disturbance of public order. 'Public order' no doubt also requires absence of disturbance of a State of serenity in society, but it goes further. It means what the French designate, *Ordre Public*, defined as an absence of insurrection, riot, turbulence, or crimes of violence. The expression 'public order' includes absence of all acts which are a danger to the security of the State and also acts which are comprehended by the expression, *Ordre Public* explained above but not acts which disturb only the serenity of others. [Para. 16.]

The State is at the centre and the society surrounds it. Disturbances of society go in a broad spectrum from mere disturbance of the serenity of life to jeopardy, of the State. The acts become graver and graver as we journey from the periphery of the larger circle towards the centre. In this journey we travel first through public tranquillity, then through public order and lastly to the security of the State. [Para 19]

Thus, the expression 'in the interest of public order' in the Constitution is capable of taking within itself not only those acts which disturb the security of the State or are within *Ordre Public* but also certain acts which disturb public tranquillity or are breaches of the peace. [Para 20]

(D) *Criminal Procedure Code (V of 1898)*, section 144 and Chapter VIII—Constitutional validity—If offend Article 19 (1) of the Constitution of India

Section 144 of the Criminal Procedure Code is not unconstitutional as offending Article 19 (1) of the Constitution of India and the fact that it may be abused is no ground for striking it down. The remedy then is to question the exercise of power as being outside the grant of the law. [Para 28]

The gist of Chapter VIII of Criminal Procedure Code is the prevention of crimes and disturbances of public tranquillity and breaches of the peace. There is no need to prove overt acts although if overt acts have taken place they have to be considered. The action being preventive is not based on overt act but on the potential danger to be averted. These provisions are thus essentially conceived in the interest of public order. They are also in the interest of the general public. If prevention of crimes, and breaches of peace and disturbance of public tranquillity are directed to the maintenance of the even tempo of community life, there can be no doubt that they are in the interest of public order. There is nothing in this chapter which is contrary to Article 19 (1) (a), (b), (c) and (d) because the limits of the restrictions are well within clauses (2), (3), (4) and (5) of Article 19. [Para 46]

(E) *Criminal Procedure Code (V of 1898)*, section 117 (3)—Interim bond under—If can be asked for without any inquiry sufficient to make out a *prima facie* case

By Majority (Bhargava, J, dissenting) Section 117 is hedged in with proper safeguards and it would be moving too far away from the guarantee of freedom, if the view were allowed to prevail that without any enquiry into the truth of the information sufficient to make out a *prima facie* case a person is to be put in jeopardy of detention. A definite finding is required that immediate steps are necessary. The order must be one which can be made into a final order unless something to the contrary is established. Therefore it is not open to a Magistrate to adjourn the case and in the interval to send a person to jail if he fails to furnish a bond. It would make his action purely administrative if he were to pass the order for an interim bond without entering upon the inquiry and at least *prima facie* inquiring into the truth of the information on which the order calling upon the person to show cause is based. Neither the scheme of the chapter nor the scheme of section 117 can bear such an interpretation. [Paras 42, 43]

Emperor v. Nabibux, A I R 1942 Sind 86
Dulal Chandra Mondal v. State, A I R 1953 Cal 238, *Gan Ganai v. State*, A I R 1959 J & K 125 and *Laxmimal v. Bherulal*, A I R 1958 Raj 349, Overruled

(F) *Criminal Procedure Code (V of 1898)*, Chapter VIII—Section 55 or 91 if can be invoked in aid of Chapter VIII

There is no room for invocation of other provisions of the Code of Criminal Procedure in aid of Chapter VIII. Apart from the fact that section 55 deals with special cases of arrest and cannot be made applicable, section 107 itself speaks that the procedure of Chapter VIII should be followed, where sections 112, 113 and 114 of the Code prescribe their own procedures. Similarly, section 91 may be available till the order under section 112 is drawn up. After it is drawn up the Magistrate has to act under section 113 and 117 (1). Then there is no room for section 91. The reasoning in some of the cases, of which *Vasudeo*

Ojha v. State of U.P., A.I.R. 1958 All. 578, is an example is fallacious.

[Para. 47.]

Petition under Article 32 of the Constitution of India.

Madhu Limaye in person.

Nur-ud-din Ahmed, K. P. Varma and D. Goburdhun, Advocates, for Respondents Nos. 1 to 4 (in W.P. No. 77 of 1970).

Niren De, Attorney-General for India (*R.H. Dhebar, H. R. Khanna and S. P. Nayyar*, Advocates, with him), for the Attorney-General for India.

K. Rajendra Chaudhuri and Pratap Singh, Advocates, for Petitioner No. 2 (in W.P. No. 307 of 1970).

C. K. Daphtary and Dr. L. M. Singhvi, Senior Advocates (*O. P. Rana*, Advocate, with them), for Respondents (in W.P. No. 307 of 1970).

Niren De, Attorney-General for India (*R. H. Dhebar, H. R. Khanna, S. P. Nayyar and R. N. Sachthey*, Advocates, with him) for the Attorney-General for India and Union of India.

S. C. Agarwal and D. P. Singh, Advocates of *M/s. Ramamurthi & Co.* for Interveners Nos. 1 to 3.

A. S. R. Chari, Senior Advocate (*S. C. Agarwal and D. P. Singh*, Advocates, of *M/s. Ramamurthi & Co.*, with him), for Interveners Nos. 4 and 7.

S. C. Agarwal and D. P. Singh, Advocates of *M/s. Ramamurthi & Co.*, and *Asif Ansari*, Advocate, for Intervener No. 5.

Shiva Pujan Singh, Advocate, for Intervener No. 6.

D. P. Singh, Advocate, for Intervener No. 8.

The Order of the Court was delivered by

Hidayatullah, C.J.—We have heard full arguments on the constitutional validity of Chapter VIII of the Code of Criminal Procedure and section 144 of the Code. Having considered the arguments we are of opinion that these provisions of the Code, when properly construed, do not offend Article 19 (1) (a), (b), (c) and (d) of the Constitution and are reasonable restrictions justified by clauses (2),

(3), (4) and (5) of that Article. We will give our detailed reasons later.

These petitions will now be laid before the Constitution Bench for further hearing on merits and for disposal.

The following Judgments of the Court were delivered :

Hidayatullah, C.J.—(On behalf of himself, *J. M. Shelat, G. K. Mitter, C. A. Vaidhalingam, A. N. Ray and I. D. Dua, JJ.*) During the hearing of these petitions the constitutional validity of section 144 and Chapter VIII of the Code of Criminal Procedure was challenged and this Special Bench was nominated to consider the issue. Lengthy arguments were addressed to us by the petitioner and several interveners. The matter, as we shall show later, lies in a narrow compass. At the end of the arguments we announced our conclusion that the said provisions of the Code, properly understood, were not in excess of the limits laid down in the Constitution, for restricting the freedoms guaranteed by Article 19 (1) (a), (b), (c) and (d). We reserved our reasons and now we proceed to give them.

2. We are required to test the impugned provisions against the first four sub-clauses of the first clause of the nineteenth article. We may accordingly begin by reading the sub-clauses;

19. (1) All citizens shall have the right—

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions; and

(d) to move freely throughout the territory of India.

These sub-clauses deal with four distinct but loosely related topics. They preserve certain personal as well as group freedoms. They allow an individual freedom of speech and movement and as a member of a group (and for the group also) the same freedoms plus the right of assembly and formation of associations and unions. Although the guarantees appear to be in absolute terms, in reality they are not so. A number of restrictive exceptions are engrafted upon each of

the freedoms previously guaranteed. The restrictions are contained in clauses (2), (3) (4) and (5) and are related respectively to sub-clauses (a) (b) (c) and (d) of the first clause. Clause (5) covers sub-clauses (e) and (f) of the first clause also but the additional fact does not concern us. Of these clause (2) as it stands today, was not originally in the Constitution but was substituted with retrospective effect by section 3 of the Constitution (First Amendment) Act, 1951. Strictly speaking there never was any clause (2) other than the one we have before us today unless we were to hold that the first amendment was either not valid or not retrospective. We were invited to do so and to reconsider the decision in *I C Golak Nath and others v State of Punjab and another*¹ but we declined because its validity was not doubted at any stage in that case. The validity of the Amendment therefore cannot now be questioned.

3 As a result we are not required to read the former clause (2) which never existed. Clauses (2), (3) and (4) were further amended by the insertion of the words 'The sovereignty and integrity of India in each of them by section 2 of the Constitution (Sixteenth Amendment) Act, 1963. The clauses as they exist today read

'(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of Court, defamation or incitement to an offence

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes or prevent the State from making any law imposing in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes or prevent the State from making any law imposing in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause

and

(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall effect the operation of any existing law in so far as it imposes or prevent the State from making any law imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe

4 All that is necessary to be decided by us is whether these clauses save the impugned provisions of the Code as reasonable and valid restrictions upon the guaranteed freedoms. Before we proceed to do so, we may dispose of a very ingenious argument by Mr. A. S. R. Chari which may be summarised thus

'The original clause (2) had to be read on the commencement of the Constitution and it was as follows—

(2) Nothing in sub-clause (a) of clause (1) shall effect the operation of any existing law in so far as it relates or prevent the State from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of or tends to overthrow, the State. This clause did not allow restrictions to be placed in the interests of public order on which the impugned provisions are justified today. Admittedly the other parts of clause (2) are not related to the impugned provisions and cannot save them without the aid of power exercisable in the interests of public order. Therefore on the coming into force of the Constitution the impugned provisions of the Code became void that is to say were dead and could not come to life again when the Constitution was amended. They had to be re-enacted.'

¹ (1967) 2 S.C.J. 486 (1967) 2 S.C.R. 762
A.I.R. 1967 S.C. 1643

5. Parties joined issue on whether the provisions were dead, that is to say, were erased from the Statute Book and required re-enactment, or were merely eclipsed, that is to say, remained ineffective till the shadow of the original clause (2) was lifted. We do not propose to enter into this debate. Assuming that the Constitution could be amended with retrospective effect (a point not free altogether from difficulty), the purpose of the amendment is to create a fiction. Whatever may be said of a law declared unconstitutional before the First Amendment, cannot be said of a law which is being considered today *after* the First Amendment. The fiction in the amendment is to make the Constitution be read with the new clause and no other and a law restricting the freedoms in the interests of public order (among others) or in the interests of the general public must be held to be saved not as a result of the amendment but because of these available restrictions operating from the inception of the Constitution. Therefore, although we consider the matter today, after much history has been written and then unwritten by retrospective amendments of the Constitution (assuming this to be permissible), we read the protection of amended clause (2) as available from 26th January, 1950 without a break. The fiction, if given full effect leads to no other conclusion. In this view of the matter we do not find it necessary to refer to the rulings of this Court where the doctrine of eclipse is considered in relation to provisions of laws declared void by Courts in the interval. That reasoning *ex facie* cannot apply to this case.

6. The result, therefore, is that we are only required to discuss whether the provisions of section 144 and Chapter VIII of the Code can be said to be in the interests of public order in so far as the rights of freedom of speech and expression, rights of assembly and formation of associations and unions are concerned and in the interests of the general public in so far as they curtail the freedom of movement throughout the territory of India.

7. In this connection only two topics arise for close study. Firstly, what is meant by the expressions "in the interest of public order" occurring in clauses (2),

(3) and (4) and "in the interests of the general public occurring in clause (5). Secondly, to what extent the provisions of section 144 and Chapter VIII come within the protection.

8. In so far as section 144 of the Code is concerned this Court in *Babulal Parate v. State of Maharashtra*¹, had held that the section was *intra vires* the Constitution but doubts were raised because the judgment of this Court spoke in terms of 'in the interests of maintenance of public order' or 'duty of maintenance of law and order' when the second clause of Article 19 speaks of 'in the interests of public order'. Differences between the import of these several expressions were pointed out in several cases from the time the earliest cases of this Court *Remesh Thappar v. State of Madras*², and *Brijbhushan v. State of Delhi*³, down to *Dr Ram Manohar Lohia v. State of Bihar and others*⁴, and some later cases following that case. The effect of *Babulal Parate's case*¹, was claimed to be lost and it was submitted that the matter needed reconsideration. Although the topic was once again before this Court in *State of Bihar v. K.K. Misra and others*⁵ when the second part of subsection (6) of the section was declared invalid, the decision in *Babulal Parate's case*¹, was not considered in the light of other cases of this Court mentioned above. Therefore this Special Bench was constituted to review the whole position in relation to section 144 and Chapter VIII of the Code.

9. The petitioner and the interveners began arguments by invoking the doctrine of preferred position for the Fundamental Rights particularly the right to freedom of speech and expression. Mr. Garg, an intervener, squarely based himself on the American doctrine. Mr. Chari for another intervener was indirect. His submission is that the Courts, when faced with the question whether any legislative or executive action is constitutional or not

1. (1961) 2 An W R. (S.C.) 154. (1961) M.L.J. (Cr.) 297 : (1961) 1 M.L.J. (S.C.) 154 : (1961) 1 S.C.J. 554. (1961) 3 S.C.R. 423.

2. (1950) S.C.J. 418 : (1950) 2 M.L.J. 390 : (1950) S.C.R. 594.

3. (1950) S.C.J. 425 : (1950) 2 M.L.J. 431 : (1950) S.C.R. 605.

4. (1966) M.L.J. (Cr.) 642 : (1966) 2 S.C.J. 549 : (1966) 1 S.C.R. 709.

5. (1969) 3 S.C.R. 337 : (1971) 1 S.C.J. 621 : (1971) M.L.J. (Cr.) 305.

must range themselves on the side of the Fundamental Freedoms and consider whether the restrictions are reasonable or not. In other words, Courts must place the burden on the State to prove the reasonableness of the restriction. A word may, therefore, be said here about how the Court must proceed to examine a challenge to the constitutional validity of laws *vis à vis* a fundamental freedom.

10 The preferred position doctrine in America developed by the Roosevelt Court through Justices Black, Douglas, Murphy, Stone and Rutledge, envisaged that any law restricting freedom of speech, press, religion or assembly must be taken on its face to be invalid till it was proved to be valid. The doctrine was perhaps the result of a remark by Justice Stone in *United States v. Carolene Products Co.*¹ But it has most frequently been used by Justices Black and Douglas in recent years after the deaths of Justices Murphy and Rutledge in 1949. Its history is given by Justice Frankfurter in his concurring opinion in *Kovacs v. Cooper*², in which he rejected it. Justice Rutledge in *Thomas v. Collins*³, stated it in these words:

"This case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable freedoms secured by the first Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation."

The result of the doctrine was to shift the burden of proof on the shoulders of

those defending the legislation, without raising in their favour the presumption of the validity of legislation. It, however, has been abandoned by the majority of Judges after 1949 when Justices Clark and Minton replaced Justices Murphy and Rutledge. Justice Frankfurter in the *Kovacs* case¹ described it as 'a complicated process of constitutional adjudication by a deceptive formula'. It is sufficient to say that the preferred position doctrine has not the support of the Supreme Court of the United States and the unreasonableness of the law has to be established.

11 In this Court the preferred position doctrine has never found ground although vague expressions such as 'the most cherished rights', the 'inviolable freedoms' sometimes occur. But this is not to say that any one Fundamental Right is superior to the other or that Article 19 contains a hierarchy. Pre-constitution laws are not to be regarded as unconstitutional. We do not start with the presumption that, being a pre-constitution law, the burden is upon the State to establish its validity. All existing laws are continued till this Court declares them to be in conflict with a fundamental right and, therefore, void. The burden must be placed on those who contend that a particular law has become void after the coming into force of the Constitution by reason of Article 13(1) read with any of the guaranteed freedoms.

12 The present doubt has arisen with regard to *Babulal Parate's case*², as stated earlier by not adhering to the phraseology of Article 19(2) where the words 'In the interest of public order' appear. It is these words which need an explanation and not the expression 'in the interest of maintenance of law and order', which are not the words of the article. To expound the meaning of the right expression we are required to go over some earlier decisions of this Court.

13 When *Ramesh Thappar v. State of Madras*³ and *Brijbhushan v. State of Delhi*⁴

1 (1949) 336 U.S. 77

2 (1961) 1 S.C.J. 554 (1961) 2 A.N.W.R. (S.C.) 154 (1961) 1 M.L.J. (S.C.) 154 (1961) M.L.J. (Cr.) 297 (1961) 3 S.C.R. 423

3 (1950) S.C.J. 418 (1950) 2 M.L.J. 390 (1950) S.C.R. 594

4 (1950) S.C.J. 425 (1950) 2 M.L.J. 431 (1950) S.C.R. 605

1 (1938) 304 U.S. 144

2 (1949) 336 U.S. 77

3 (1944) 323 U.S. 516

were decided, the original clause (2) was there. It did not include the phrase 'in the interest of public order'. The validity of statutes was, therefore, tested against the words 'the security of the State'. After the retrospective amendment substituted a new clause, the matter fell to be considered in relation to 'public order'. In *Ramjilal Modi v. State of Uttar Pradesh*¹, it was pointed out that the language employed by the Constitution, that is to say, 'in the interest of' was wider than the expression 'for the maintenance of' and the former expression made the ambit of the protection very wide. It was observed that 'a law may not have been designed to directly maintain public order and yet it may have been enacted in the interest of public order'. This was again reaffirmed in *Virendra v. State of Punjab*², distinguishing on the same ground the two cases before the First Amendment. The following passage (page 323) may be quoted :

"It will be remembered that Article 19 (2), as it was then worded, gave protection to a law relating to any matter which undermined the security of or tended to overthrow the State. Section 9 (1-A) of the Madras Maintenance of Public Order was made 'for the purpose of securing public safety and the maintenance of public order'. It was pointed out that whatever end the impugned Act might have been intended to subserve and whatever aim its framers might have had in view, its application and scope could not, in the absence of limiting words in the statute itself, be restricted to the aggravated form of activities which were calculated to endanger the security of the State. Nor was there any guarantee that those officers who exercised the power under the Act would, in using them, discriminate between those who acted prejudicially to the security of the State and those who did not. This consideration cannot apply to the case now under consideration. Article 19 (2) has been amended so as to extend its protection to a law imposing reasonable restrictions in the interests of public order and the language

used in the two sections of the impugned Act quite clearly and explicitly limits the exercise of the powers conferred by them to the purposes specifically mentioned in the sections and to no other purpose".

We may say at once that the distinction has our respectful concurrence.

14. Then came the decision in *Superintendent, Central Prison, Fategarh v. Ram Manohar Lohia*¹. In that case, the expression 'in the interest of public order' fell to be considered. Subbarao, J. (as he then was) traced the exposition of the phrase, particularly the expression 'public order'. He referred first to the observations of Patanjali Sastri, J., (later C.J.) in *Ramesh Thappar's case*², distinguishing offences involving disturbances of public tranquillity which the learned Judge said were in theory offences against public order of a purely local significance and other forms of public disorders of more serious and aggravated kind calculated to endanger the security of the State. Subbarao, J., also quoted the observations of Fazl Ali, J., in *Brij Bhushan's case*³,

"When we approach the matter in this way, we find that while 'public disorder' is wide enough to cover a small riot or an affray and other cases where peace is disturbed by, or affects, a small group or persons, 'public unsafety' (or insecurity of the State) will usually be connected with serious internal disorders and such disturbances of public tranquillity as jeopardises the security of the State" (page 612).

Subbarao, J. on the strength of these observations concluded that 'public order' was the same as 'public peace and safety' and went on to observe :

"Presumably in an attempt to get over the effect of these two decisions, the expression 'public order' was inserted in Article 19 (2) of the Constitution by the Constitution (First Amendment) Act, 1951, with a view to bring in offences involving breach of purely local significance within the scope of

1. (1960) S.C.J. 567 : (1960) M.L.J. (CrI) 340 : (1960) 2 S.C.R. 821.

2. (1950) S.C.J. 418 : (1950) 2 M.L.J. 390 : (1950) S.C.R. 594.

3. (1950) S.C.J. 425 : (1950) 2 M.L.J. 431 : (1950) S.C.R. 605

1. (1957) S.C.J. 522 : (1957) 2 An W.R. (S.C.) 65 : (1957) M.L.J. (CrI) 771 : (1957) 2 M.L.J. (S.C.) 65 : (1957) S.C.R. 860

2. (1958) S.C.J. 88 : (1958) S.C.R. 308.

'permissible restrictions under clause (2), of Article 19'

He quoted the observations of the Supreme Court of the United States in *Cantwell v Connecticut*¹, to establish that offences against public order were also understood as offences against public safety and public peace. He referred to a passage in a text book on the American Constitution which states

"In the interests of public order, the State may prohibit and punish the causing of loud and raucous noise' in streets and public places by means of sound amplifying instruments, regulate the hours and place of public discussion, and the use of public streets for the purpose of exercising freedom of speech, provide for the expulsion of hecklers from meetings and assemblies, punish utterances tending to incite an immediate breach of the peace or riot as distinguished from utterances causing mere public inconvenience, annoyance or unrest"

He referred also to the Public Order Act 1936, in England

15 Subbarao, J, however, distinguished the American and English precedents observing

"But in India under Article 19 (2) this wide concept of Public order is split up under different heads. It enables the imposition of reasonable restrictions on the exercise of the right to freedom of speech and expression in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence. All the grounds mentioned therein can be brought under the general head 'public order in its most comprehensive sense'. But the juxtaposition of the different grounds indicates that, though sometimes they tend to overlap, they must be ordinarily intended to exclude each other. 'Public order' is therefore something which is demarcated from the others. In that limited sense, particularly in view of the history of the amendment it can be postulated that public order is synonymous

with public peace, safety and tranquillity"

His summary of his analysis of cases may be given in his own words.

"'Public order' is synonymous with public safety and tranquillity, it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State"

16 We may here observe that the overlap of public order and public tranquillity is only partial. The terms are not always synonymous. The latter is a much wider expression and takes in many things which cannot be described as public disorder. The words 'public order' and 'public tranquillity' overlap to a certain extent but there are matters which disturb public tranquillity without being a disturbance of public order. A person playing loud music in his own house in the middle of the night may disturb public tranquillity, but he is not causing public disorder. 'Public order' no doubt also requires absence of disturbance of a state of serenity in society but it goes further. It means what the French designate *ordre public*, defined as an absence of insurrection, riot, turbulence, or crimes of violence. The expression 'public order' includes absence of all acts which are a danger to the security of the State and also acts which are comprehended by the expression '*ordre public*' explained above but not acts which disturb only the serenity of others

17 The English and American precedents and legislation are not of much help. The Public Order Act, 1936 was passed because in 1936 different political organisations marched in uniforms causing riots. In America the First Amendment freedoms have no such qualifications as in India and the rulings are apt to be misapplied to our Constitution.

18 In the next case of this Court reported in *Dr Ram Manohar Lohia v State of Bihar and others*¹, it was pointed out that for expounding the phrase 'maintenance of public order'

"One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents the security of the State".

All cases of disturbances of public tranquillity fall in the largest circle but some of them are outside 'public order' for the purpose of the phrase 'maintenance of public order' similarly every breach of public order is not necessarily a case of an act likely to endanger the security of the State.

19. Adopting this test we may say that the State is at the centre and society surrounds it. Disturbances of society go in a broad spectrum from mere disturbance of the serenity of life to jeopardy of the State. The acts become graver and graver as we journey from the periphery of the larger circle towards the centre. In this journey we travel first through public tranquillity, then through public order and lastly to the security of the State.

20. In dealing with the phrase 'maintenance of public order' in the context of preventive detention, we confined the expression in the relevant Act to what was included in the second circle and left out that which was in the larger circle. But that consideration need not always apply because small local disturbances of the even tempo of life, may in a sense be said to affect 'public order' in a different sense, namely, in the sense of a state of law-abidingness *vis-a-vis* the safety of others. In our judgment the expression 'in the interest of public order' in the Constitution is capable of taking within itself not only those acts which disturb the security of the State or are within *ordre publique* as described but also certain acts which disturb public tranquillity or are breaches of the peace. It is not necessary to give to the expression a narrow meaning because, as has been observed, the expression 'in the interest of public order' is very wide. Whatever may be said of 'maintenance of public order' in the context of special laws entailing detention of persons without a trial on the pure subjective determination of the Executive cannot be said in other circumstances. In the former case this Court confined the mean-

ing to graver episodes not involving cases of law and order which are not disturbances of public tranquillity but of *ordre publique*.

21. It was argued that there cannot be two kinds of detentions one by Magistrates under the Code of Criminal Procedure and another under laws made for preventive detention under Article 22 of the Constitution. In our opinion the area of the two is entirely different and there is, therefore, good classification. We now proceed to consider the impugned provisions of the Code in the light of what we have said above.

22. We first take up for consideration section 144 of the Code. It finds place in Chapter XI which contains one section only. It is headed 'Temporary Orders in urgent cases of nuisance or apprehended danger'. The section confers powers to issue an order absolute at once in urgent cases of nuisance or apprehended danger. Such orders may be made by specified classes of Magistrates when in their opinion there is sufficient ground for proceeding under the section and immediate prevention or speedy remedy is desirable. It requires the Magistrate to issue his order in writing setting forth the material facts of the case and the order is to be served in the manner provided by section 134 of the Code. The order may direct :

(A) Any person to abstain from a certain act, or

(B) to take certain order with certain property in his possession or under his management.

The grounds for making the order are that in the opinion of the Magistrate such direction

(a) is likely to prevent, or

(b) tends to prevent.

(i) obstruction, (ii) annoyance or (iii) injury, to any person lawfully employed or (iv) danger to human life, health or safety or (v) a disturbance of the public tranquillity or (vi) a riot or (vii) an affray.

Stated briefly the section provides for the making of an order which is either

prohibitory (A) or mandatory (B) as shown above. Its efficacy is that (a) it is likely to prevent or (b) it tends to prevent, some undesirable happening. The gist of these happenings are

(i) obstruction, annoyance or injury to any person lawfully employed, or

(ii) danger to human life, health or safety, or

(iii) a disturbance of the public tranquillity or a riot or an affray

23 The procedure to be followed is next stated. Under sub-section (2) if time does not permit or the order cannot be served, it can be made *ex parte*. Under sub-section (3) the order may be directed to a particular individual or to the public generally when frequenting or visiting a particular place. Under sub-section (5) where the Magistrate is moved by a person aggrieved he must hear him so that he may show cause against the order and if the Magistrate rejects wholly or in part the application he must record his reasons in writing. This sub-section is mandatory. An order by the Magistrate does not remain in force after two months from the making thereof but the State Government may, however, extend the period by a notification in the Gazette but, only in cases of danger to human life, health or safety or where there is a likelihood of a riot or an affray. But the second portion of the sub-section was declared violative of Article 19 in, *State of Bihar v. K. K. Mishra*¹. It may be pointed out here that disobedience of an order lawfully promulgated is made an offence by section 188 of the Indian Penal Code, if such disobedience causes obstruction, annoyance or injury to persons lawfully employed. It is punishable with simple imprisonment for one month or fine of Rs. 200 or both.

24 The gist of action under section 144 is the urgency of the situation, its efficacy is the likelihood of being able to prevent some harmful occurrences. As it is possible to act absolutely and even *ex parte* it is obvious that the emergency must be sudden and the consequences sufficiently grave. Without it the exercise of power would have no justification. It is not

an ordinary power flowing from administration but a power used in a judicial manner and which can stand further judicial scrutiny in the need for the exercise of the power, in its efficacy and in the extent of its application. There is no general proposition that an order under section 144, Criminal Procedure Code, cannot be passed without taking evidence. See *Mst. Jagrupa Kumari v. Chobay Narain Singh*¹, which in our opinion is correct in laying down this proposition. These fundamental facts emerge from the way the occasions for the exercise of the power are mentioned. Disturbances of public tranquillity, riots and affray lead to subversion of public order unless they are prevented in time. Nuisances dangerous to human life, health or safety have no doubt to be abated and prevented. We are, however, not concerned with this part of the section and the validity of this part need not be decided here. In so far as the other parts of the section are concerned the key note of the power is to free society from menace of serious disturbances of a grave character. The section is directed against those who attempt to prevent the exercise of legal rights by others or imperil the public safety and health. If that be so the matter must fall within the restrictions which the Constitution itself visualizes as permissible in the interest of public order, or in the interest of the general public. We may say, however, that annoyance must assume sufficiently grave proportions to bring the matter within interests of public order.

25 The criticism, however, is that the section suffers from over broadness and the words of the section are wide enough to give an absolute power which may be exercised in an unjustifiable case and then there would be no remedy except to ask the Magistrate to cancel the order which he may not do. Revision against his determination to the High Court may prove illusory because before the High Court can intervene the mischief will be done. Therefore, it is submitted that an inquiry should precede the making of the order. In other words, the burden should not be placed upon the person affected to clear his position. Further the order may be so general as to affect

¹ (1971) 1 S.C.J. 621 (1971) M.L.J. (Cri) 305 (1969) 3 S.C.R. 337

not only a particular party but persons who are innocent, as for example when there is an order banning meetings, processions, playing of music etc.

26. The effect of the order being in the interest of public order and the interests of the general public, occasions may arise when it is not possible to distinguish between those whose conduct must be controlled and those whose conduct is clear. As was pointed out in *Babulal Parate's case*¹, where two rival trade unions clashed and it was difficult to say whether a person belonged to one of the unions or to the general public, an order restricting the activities of the general public in the particular area was justified.

27. It may be pointed out that mere disobedience of the order is not enough to constitute an offence. There must be in addition obstruction, annoyance, or danger to human life, health or safety or a riot or an affray before the offence under section 188, Indian Penal Code, is constituted. Thus the person affected has several remedies. He can ask the order to be vacated as against him, he can file a revision and even a petition for a writ. But no person can ask to be considered free to do what he likes when there are grounds for thinking that his conduct would be of the kind described in the section for purposes of preventive action. Ordinarily the order would be directed against a person found acting or likely to act in a particular way. A general order may be necessary when the number of persons is so large that distinction between them and the general public cannot be made without the risks mentioned in the section. A general order is thus justified but if the action is too general the order may be questioned by appropriate remedies for which there is ample provision in the law.

28. All these matters were considered also by this Court in *Babulal Parate's case*¹. In that case the Court emphasised that the restraint is temporary, the power is exercised by senior Magistrates who have to set down the material facts, in other words, to make an inquiry in the exercise of judicial power with reasons for the order, with an opportunity to an aggrieved person to have it rescinded either by the

Magistrate or the superior Courts. We have reconsidered all these matters and are satisfied that there are sufficient safeguards available to person affected by the order and the restrictions therefore are reasonable. We are of opinion that section 144 is not unconstitutional if properly applied and the fact that it may be abused is no ground for striking it down. The remedy then is to question the exercise of power as being outside the grant of the law.

29. We next proceed to consider the constitutional validity of Chapter VIII of the Code. It finds place in Part IV which has the explanatory heading 'Prevention of Offences.' The Chapter is divided into three divisions A, B and C. The purport of the Chapter can be gathered from its sub-heading 'Of Security for keeping the peace and for good behaviour'.

30. Division A is for security for keeping the peace on conviction. It consists of only one section (section-106) and it provides that on conviction for certain offences the Court may, at the time of passing sentence on the person convicted, if of opinion, that it is necessary to take a bond for future good behaviour, order him to execute a bond, with or without sureties, for keeping the peace for a period not exceeding three years. The sum for which the bond is taken is proportionate to the means of the person and it becomes void if the conviction ultimately fails. The section is aimed at persons whose past conduct has proved dangerous to the public and is intended to secure public tranquillity and peace.

31. Division B then consists of 12 sections (sections 107-110 and 112-119) and applies to cases other than those mentioned in section 106. Of these, section 107 is for taking security generally for keeping the peace; section 108 is for security for good behaviour from persons disseminating seditious; section 109 for security for good behaviour from vagrants and suspected persons; and section 110 for security for good behaviour from habitual offenders. Sections 112-119 lay down the procedure to be followed in these cases. We are concerned in these cases with the provisions of section 107 and therefore need not refer to sections 108-110.

1. (1961) 1 An W.R. (S.C.) 154; (1961) 1 M.L.J. (S.C.) 154; (1961) M.L.J. (Cal.) 297; (1961) 1 S.C.J. 554; (1961) 3 S.C.R. 423.

32 The gist of section 107 may now be given. It enables certain specified classes of Magistrates to make an order calling upon a person to show cause why he should not be ordered to execute a bond, with or without sureties for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix. The condition of taking action is that the Magistrate is informed and he is of opinion that there is sufficient ground for proceeding that a person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity. The Magistrate can proceed if the person is within his jurisdiction or the place of the apprehended breach of the peace or disturbance is within the local limits of his jurisdiction. The section goes on to empower even a Magistrate not empowered to take action to record his reason for acting, and then to order the arrest of the person (if not already in custody or before the Court) with a view to sending him before a Magistrate empowered to deal with the case, together with a copy of his reasons. The Magistrate before whom such a person is sent may in his discretion detain such person in custody pending further action by him.

33 This section is aimed at persons who cause a reasonable apprehension of conduct likely to lead to a breach of the peace or disturbance of the public tranquillity. This is an instance of preventive justice which the Courts are intended to administer. This provision like the preceding one is in aid of orderly society and seeks to nip in the bud conduct subversive of the peace and public tranquillity. For this purpose Magistrates are invested with large judicial discretionary powers for the preservation of public peace and order. Therefore the justification for such provisions is claimed by the State to be in the function of the State which embraces not only the punishment of offenders but as far as possible the prevention of offences.

34 Both the sections are counter parts of the same policy, the first applying when by reason of the conviction of a person, his past conduct leads to an apprehension for the future and the

second applying where the Magistrate, on information, is of the opinion that unless prevented from so acting a person is likely to act to the detriment of the public peace and public tranquillity. The argument is that these sections (more particularly section 107) are destructive of freedom of the individual guaranteed by Article 19 (1) (a), (b), (c) and (d) and are not saved by the restrictions contemplated by clauses (2) to (5) of the article. It is also contended that there are no proper procedural safeguards in the sections that follow. Before we deal with these contentions it is necessary to glance briefly at sections 112-119 of Division B and sections 120-126 A of Division C.

35 We have seen the provisions of section 107. That section says that action is to be taken in the manner hereinafter provided' and this clearly indicates that it is not open to a Magistrate in such a case to depart from the procedure to any substantial extent. This is very salutary because the liberty of the person is involved and the law is rightly solicitous, that this liberty should only be curtailed according to its own procedure and not according to the whim of the Magistrate concerned. It behoves us, therefore to emphasise the safeguards built into the procedure because from there will arise the consideration of the reasonableness of the restrictions in the interest of public order or in the interest of the general public.

36 The procedure begins with section 112. It requires that the Magistrate acting under section 107 shall make an order in writing, setting forth the substance of the information received, the amount of the bond, the term for which it is to be in force and the number, character and class of sureties (if any) required. Since the person to be proceeded against has to show cause, it is but natural that he must know the grounds for apprehending a breach of the peace or disturbance of the public tranquillity at his hands. Although the section speaks of the 'substance of the information' it does not mean the order should not be full. It may not repeat the information bodily but it must give proper notice of what has moved the Magistrate to take the action. This order is the foundation of the jurisdiction and the word substance means the essence or

the most important parts of the information.

37 Next follow three sections—sections 113-115. They deal with the person's presence. Section 113 deals with the situation when the person is present in Court, then the order shall be read over to him and if he so desires, the substance of it shall be explained to him. This is not a mere formality. The intention is to explain to the person what the allegations against him are. The next section (section 114), deals with a situation when the person is not present in Court. There the option is two-fold. Ordinarily, a summons must issue to him but in cases where the immediate arrest of the person is necessary a warrant for his arrest may issue. This is however subject to the qualification that there must be a report of a Police Officer or other information in that behalf and the breach of the peace cannot otherwise be prevented. The Magistrate must not act on an oral information but must record the substance of it before issuing a warrant. The section also envisages a situation in which the person is already in custody. In that case the Magistrate shall issue a warrant directing the Officer having the custody to produce that person. The provisions of this section are quite clearly reasonable in the three circumstances it deals with. If the presence of the person is to be secured, a summons to him is the normal course except in the other two cases.

38. Section 115 then provides that such summons or warrant under section 114, as the case may be, must be accompanied by the order under section 112 and the person serving or executing the summons or warrant must serve the order on the person. There is enabling power in section 116 under which the Magistrate may dispense with the presence of the person in Court and allow him to appear by a pleader.

39. Then follows section 117. That section (omitting the proviso to the third sub-section and omitting sub-sections (4) and (5) which do not concern us) may be read here :

“117. *Inquiry as to truth of information—*

(1) When an order under section 112 has been read or explained under

section 113 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with or in execution of, a summons or warrant issued under section 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such evidence as may appear necessary

(2) Such inquiry shall be made, as nearly as may be practicable, in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases

(3) Pending the completion of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under section 112 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed or, in default of execution, until the enquiry is concluded.”

40. The first sub-section read with the second requires the Magistrate to proceed to inquire into the truth of the information. The third sub-section enables the Magistrate to ask for an interim bond pending the completion of the inquiry by him. This is conditioned by the fact that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for preservation of public safety. This is applicable where the person is not in custody and his being at large without a bond may endanger public safety etc. The Magistrate has to justify his action by reasons to be recorded in writing. If the person fails to execute a bond, with or without sureties, the Magistrate is empowered to detain him in custody.

41. A question was raised before us whether the Magistrate can defer the inquiry and yet ask for an interim bond. There is a difference of opinion in the

High Courts Some learned Judges are of opinion that this action can be taken as soon as the person appears because then the Magistrate may be said to have entered upon the inquiry. Other learned Judges are of the opinion that sub-sections (1) and (2) envisage that the Magistrate must proceed to inquire into the truth of the information and only after *prima facie* satisfying himself about the truth and after recording his reasons in writing can the interim bond be asked for. Some of the cases on the previous view are—*Emperor v. Nabibux & others*¹, *Dulal Chandra Mondal v. State*², *Gani Ganai and others v. State*³ and *Laxmial v. Bherulal*⁴. Those representing the other view are—*In re Multiswami*⁵, *In re Venkatasubba Reddy*⁶, *Jagdish Prasad v. State*⁷, *Jalaludin Kunju v. State*⁸, *Shravan Kumar Gupta v. Superintendent District Jail Mathura and others*⁹, *Jangir Singh v. The State*¹⁰, *Rama Gowda & others v. State of Mysore*¹¹ and *Ratilal Jasraj v. The State*¹².

42 In our opinion the words of the section are quite clear. As said by Straight, J in *Emperor v. Babua*¹³, the order under section 112 is on hearsay but the inquiry under section 117 is to ascertain the truth of the necessary information. Sub-section (1) contemplates an immediate inquiry into the truth of the information. It is pending the completion of the inquiry that an interim bond can be asked for if immediate measures are necessary, and in default it is necessary to put the person in custody. Therefore, as the liberty of a person is involved and that person is being proceeded against on information and suspicion, it is necessary to put a strict construction upon the powers of Magistrate. The facts must be of definite character. In *Nagar Chandra Pal v. The King Emperor*¹⁴, there was only a

petition and a report and these were not found sufficient material. In some of the cases before us no effort was made by the Magistrate to inquire into the truth of the allegation. The Magistrate adjourned the case from day to day and yet asked for an interim bond. This makes the proceedings entirely one sided. It cannot be described as an inquiry within an inquiry as has been said in some cases. Some inquiry has to be made before the bond can be ordered. We therefore, approve of those cases in which it has been laid down that some inquiry should be made before action is taken to ask for an interim bond or placing the person in custody in default. In an old case reported in *A D Datta v. Hemchandra*¹, a Full Bench of the Calcutta High Court went into the matter. The case arose before the present Code of Criminal Procedure and, therefore, there was no provision for an interim bond. But what Sir Barnes Peacock, C J. said applies to the changed law also not only with regard to the ultimate order but also to the interim order for a bond. The section, even as it is drafted today is hedged in with proper safeguards and it would be moving too far away from the guarantee of freedom, if the view were allowed to prevail that without any inquiry into the truth of the information sufficient to make out a *prima facie* case a person is to be put in jeopardy of detention. A definite finding is required that immediate steps are necessary. The order must be one which can be made into a final order unless something to the contrary is established. Therefore it is not open to a Magistrate to adjourn the case and in the interval to send a person to jail if he fails to furnish a bond. If this were the law a bond could always be insisted upon before even the inquiry began and that is neither the sense of the law nor the wording or arrangement of the sections already noticed.

43 The power which is conferred under this Chapter is distinguished from the power of detention by executive action under Article 22 of the Constitution. Although the order to execute a bond, issued before offence is committed, has the appearance

- 1 A.I.R. 1942 Sind 86
- 2 A.I.R. 1953 Cal 238
- 3 A.I.R. 1959 J & K. 125
- 4 A.I.R. 1958 Raj 349
- 5 I.L.R. (1940) Mad 335 (F B) (1940) 1 M.L.J. 11
- 6 A.I.R. 1955 Andh Pra 96
- 7 A.I.R. 1957 Pat 106
- 8 A.I.R. 1952 Trav & Co 262
- 9 A.I.R. 1957 All 189
- 10 A.I.R. 1960 Punj 225
- 11 A.I.R. 1960 Mys 259
- 12 A.I.R. 1956 Bom 385
- 13 (1884) I.L.R. 6 All 132
- 14 (1924) 28 C.W.N. 23

of an administrative order, in reality it is judicial in character. Preliminarily the provision enables the Magistrate to require the execution of a bond and not to detain the person. Detention results only on default of execution of such bond. It is, therefore, not apposite to characterise the provision as a law for detention contemplated by Article 22. The safeguards are therefore different. The person sought to be bound over has rights which the trial of summons case confers on an accused. The order is also capable of being questioned in superior Courts. For this reason, at every step the law requires the Magistrate to state his reasons in writing. It would make his action purely administrative if he were to pass the order for an interim bond without entering upon the inquiry and at least *prima facie* inquiring into the truth of the information on which the order calling upon the person to show cause is based. Neither the scheme of the chapter nor the scheme of section 117 can bear such an interpretation. We accordingly, hold in the case of *Madhu Limaye—(Madhu Limaye & Another v. Ved Murti & others)*¹, that as the case was simply adjourned from time to time and there was no inquiry before remanding him to custody his detention was illegal. We may now briefly notice the remaining sections of the Chapter.

44. Section 118 then lays down that if upon inquiry it is proved that the person be called upon to execute a bond for keeping the peace or maintaining good behaviour the Magistrate may call upon him to execute a bond. The security must not be more than that stated in the order under section 112, nor excessive. Under section 119 the Magistrate may discharge the person or release him from custody if the necessity for keeping him bound over is not proved.

45. The last Division numbered C relates to proceedings subsequent to section 118. Section 120 fixes the *terminus a quo* for the period for which security is required. Section 121 gives the contents of the bond and the conditions under which there is a breach of the bond. Section 122 empowers the Magistrate to reject sureties but only after inquiry and recording the

evidence and his reasons for rejection. Section 123 gives power to commit a person to prison or to be detained in prison if already there for the duration mentioned in the bond. If the period is more than a year then the proceedings have to be submitted to a superior Court. It also provides for ancillary matters. Section 124 empowers the District Magistrate or a Chief Presidency Magistrate to release a person so detained when there is no longer any hazard to the community or to any other person. There are other provisions for reducing security etc., with which we are not concerned. Section 125 enables the same Magistrates to cancel any bond for sufficient reason and under section 126 the sureties also stand discharged. Section 126-A deals with security for the unexpired period of bond to which no special reference is needed.

46. The gist of the Chapter is the prevention of crimes and disturbances of public tranquillity and breaches of the peace. There is no need to prove overt acts although if overt acts have taken place they will have to be considered. The action being preventive is not based on overt act but on the potential danger to be averted. These provisions are thus essentially conceived in the interest of public order in the sense defined by us. They are also in the interest of the general public. If prevention of crimes, and breaches of peace and disturbance of public tranquillity are directed to the maintenance of the even tempo of community life, there can be no doubt that they are in the interest of public order. As we have shown above 'public order' is an elastic expression which takes within it various meanings according to the context of the law and the existence of special circumstances. This power was used in England for over 400 years and is not something which is needed only for administration of colonial empires. Its need in our society today is as great as it was before the British left. We find nothing contrary to Article 19 (1) (a), (b), (c) and (d) because the limits of the restrictions are well within clauses (2), (3), (4) and (5). We accordingly hold the Chapter as explained by us to be constitutionally valid.

47. Before we leave this topic it is necessary to emphasise that there is no

room for invocation of other provisions of the Code, such as section 55 or 91. In some of the cases of the High Courts, to which reference is not necessary, recourse has been taken to these provisions in aid of Chapter VIII. Apart from the fact (which we have sufficiently emphasised above) that section 55 deals with special cases of arrest and cannot be made applicable, section 107 itself speaks that the procedure of Chapter VIII should be followed, where sections 112, 113 and 114 of the Code prescribe their own procedures. Similarly, section 91 may be available till the order under section 112 is drawn up. After it is drawn up the Magistrate has to act under sections 113 and 117 (1). Then there is no room for section 91. The reasoning in some of the cases of which *Vasudeo Ojha and others v State of Uttar Pradesh*¹, is an example, is fallacious.

48 There is also no question of bail to the person because if instead of an interim bond, bail for appearance was admissible Chapter VIII would undoubtedly have said so. Further bail is only for the continued appearance of a person and not to prevent him from committing certain acts. To release a person being proceeded against under sections 107/112 of the Code is to frustrate the very purpose of the proceedings unless his good behaviour is ensured by taking a bond in that behalf.

49 We have said in our earlier order that we hold the provisions of section 144 and Chapter VIII, as interpreted by us, to be valid. We have shown above how these provisions have to be understood and applied. So read, we are of opinion that they do not offend the provisions of Article 19 (1) (a), (b) (c) and (d).

Bhargava, J—I agree with the judgment of my Lord the Chief Justice, with the exception that I am unable to subscribe to the view that in proceedings started under section 107 of the Code of Criminal Procedure, the Magistrate can direct the person in respect of whom an order under section 112 has been made, to execute a bond with or without sureties, for keeping the peace pending completion of the enquiry and in default

detain him in custody until such bond is executed, only after he has entered upon the enquiry under section 117 (1) and has found a *prima facie* case satisfying himself about the truth of the information on the basis of which the proceedings were started. This interpretation, in my opinion, will completely defeat the purpose of section 117 (3).

51 It has to be noticed that, when proceedings are contemplated under section 107, the Magistrate takes action when he is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity only after forming an opinion that there is sufficient ground for proceeding against him. The Magistrate cannot start the proceedings merely because of the information received by him. Pursuant to the information, the Magistrate was to form his opinion that there is sufficient ground for proceeding. This opinion can be formed on the basis of the information supplied to him if he finds that the information is given in sufficient detail and is reliable enough to justify his acting on its basis. In cases where the information given is not of such nature, it will be the duty of the Magistrate to hold further inquiry and satisfy himself that it is a fit case where action should be taken because sufficient grounds exist. There may be cases where the information may be received from the Police in which case the Magistrate may examine all the police papers and satisfy himself that there do exist sufficient grounds for him to take the proceedings as requested by the Police. There may be cases where the proceedings may be instituted at the instance of a private complainant who may be apprehending breach of the peace by the person complained against. In such cases the Magistrate is bound either to hold some inquiry himself by examining witnesses on oath or to have an inquiry made through the Police, so that he may be able to form a correct opinion as to the existence of sufficient grounds for proceeding. It is after the Magistrate has taken these steps that he can proceed to make the order under section 112. When making that order he has to record in writing the substance of the information received which necessarily means the part of the informa-

tion which was the basis of his opinion that sufficient grounds exist for initiating the proceedings. It is at this preliminary stage that the Magistrate is thus required to ensure that a *prima facie* case does exist for the purpose of initiating proceedings against the person who is to be called upon to furnish security for keeping the peace.

52. After the order under section 112 has been issued, the procedure to be adopted is that contained in sections 113 and 114. If such person is present in Court, the order under section 112 has to be read over to him and, if he so desires, the substance thereof has to be explained to him. If he is not present in Court, the Magistrate has to issue a summons requiring him to appear, or, when such person is in custody, a warrant, directing the officer in whose custody he is to bring him before the Court. Another alternative procedure is laid down for cases where it appears to the Magistrate that there is reason to fear the commission of a breach of the peace and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, in such cases, the Magistrate can issue a warrant for the arrest of that person. It is under this procedure that the person appears or is brought before the Court. The proceedings to be taken thereafter are laid down in section 117 (1) which requires that, as soon as the order under section 112 has been read or explained to the person present in Court under section 113, or to the person who appears or is brought before a Magistrate under section 114, the Magistrate has to proceed to enquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary. This inquiry under sub-section (2) of section 117 has to be held in the manner prescribed for conducting trials and recording evidence in summons cases. Sub-section (1) of section 117, thus, contains in mandatory direction on the Magistrate to start proceedings of inquiry as soon as the person, in respect of whom the order under section 112 has been made, appears before the Magistrate. Section 117 (1) makes it clear that the Magistrate must institute the inquiry without any unnecessary delay. This provision cannot, however, be

interpreted as requiring that the inquiry must begin immediately when the person appears in the Court. Obviously, such a requirement would be impracticable. In a case where a summons is issued to the person to appear in Court, or a warrant is issued under the proviso to section 114 for his arrest, the date and time when the person will appear in the Court of the Magistrate will always remain uncertain. Some time will have to be taken in serving the summons and, depending on the distance and accessibility of the place where the persons happens to be, the time taken in serving the summons will vary. Even in cases where a warrant is issued under the proviso to section 114, the person may not be produced in Court immediately because of the place of his arrest which may be miles away from the Court of the Magistrate. The Legislature could not have contemplated that, in such contingencies, witnesses must be kept ready in the Court of the Magistrate awaiting the appearance of the person concerned, so that the Magistrate can start the inquiry immediately. Further, the inquiry under section 117 (1) is directed in the manner prescribed for conducting trials in summons cases. The result of the inquiry can be that the person concerned can be asked to execute bonds and give sureties for keeping the peace and, if he commits default in doing so, he can be detained in prison losing his personal liberty. In such cases, the person concerned has a right to be represented by a lawyer in the inquiry. Consequently, when he appears before the Magistrate, he can legitimately ask for a seasonable adjournment to enable him to engage a lawyer of his choice and, thus, at his own request, he can ensure that the inquiry does not begin immediately. The proper interpretation of sub-section (1) of section 117, in my opinion, is that the inquiry must be begun as soon as practicable and a Magistrate would be committing a breach of the direction contained in this sub-section if he postpones the inquiry without sufficient reasons.

53. It is in the light of these principles that, in my opinion, the power granted to the Magistrate under section 117 (3) should be interpreted. That power is given for cases where immediate measures are necessary for the prevention of a

breach of the peace. In such a situation, the Magistrate can direct the person, in respect of whom the order under section 112 has been made, to execute a bond, with or without sureties, for keeping the peace pending completion of the inquiry under section 117 (1) and, if he fails to execute the bond, the Magistrate can direct his detention until the inquiry is concluded. This power to be exercised by the Magistrate in emergent cases has been conferred in the background of the procedure which he has to adopt under section 107 of forming an opinion, after receipt of information, that there do exist sufficient grounds for taking proceedings. At the first stage, when forming such opinion, the Magistrate naturally acts *ex parte* and has to rely on information supplied to him or other information obtained by him in the absence of the person against whom proceedings are to be taken. It is on the basis of that opinion that the Magistrate proceeds to make the order under section 118 and is empowered even to issue a warrant of arrest under the proviso to section 114. The power under section 117 (3) is most likely to be invoked in cases where the Magistrate has, at an earlier stage, issued the warrant under the proviso to section 114. This is so because the warrant is issued in cases where breach of the peace cannot be prevented otherwise than by immediate arrest, and section 117 (3) also is to be invoked where the Magistrate considers that immediate measures are necessary for prevention of breach of the peace. The Legislature, having empowered the Magistrate to issue warrant of arrest, naturally proceeded further to give power to the Magistrate in such cases to direct that bonds for keeping the peace be furnished pending completion of the inquiry. The expression 'completion of the inquiry' must be interpreted as the period covered from the beginning of the inquiry until its conclusion. The bonds can therefore cover the period from the moment the inquiry is to begin. Such a power for requiring that bond be furnished pending inquiry is obviously necessary where there is immediate danger of breach of the peace and immediate measures are necessary for its prevention. The order is made on the basis of the earlier opinion formed by the Magistrate under section 107. Subsequently, of

course, when the inquiry is held under section 117 (1), the correctness of the information and the tentative opinion formed *ex parte* under section 117 will be properly tested after going through the judicial procedure prescribed for the trial of summons cases and, thereupon, if it is found that there was no justification, the order would be revoked. In my opinion, the grant of such a power to a Magistrate is a very reasonable restriction on the personal liberty of a citizen. It is needed for prevention of crimes and it can only be effective if its exercise is permitted on the basis of opinion formed by a competent authority that immediate measures are required. It is true that, under section 117 (3) a person can be detained in jail even prior to a Court arriving at a judicial finding against him, but such a procedure is not only reasonable, but essential.

54 In this respect, the power of a Magistrate in regard to a person accused of a cognizable offence is comparable. If a Magistrate has sufficiently reliable information to form an opinion that a person has committed a cognizable offence the Magistrate can order his detention as an under trial prisoner. At that stage, the law deems that person still to be innocent and, yet, his detention in prison is considered reasonable in order to ensure that a proper trial can be held and there is no repetition of the offence of which that person is accused. This detention as an under-trial prisoner is also based on the *ex parte* opinion formed by the Magistrate before the actual trial. The power granted under section 117 (3) is very similar and is intended to ensure that the person, from whom breach of the peace is apprehended, is not at liberty to commit breach of the peace and thus defeat the purpose of the proceedings by being allowed to remain at liberty without any undertaking during the pendency of the inquiry.

55 In this connection, it was urged by Mr Garg that if section 117 (3) is interpreted as permitting a Magistrate to direct furnishing of bonds for keeping the peace and to order detention in default without any evidence being obtained in the course of the inquiry, the Magistrate may keep on adjourning

(11)

the hearing of the inquiry under section 117 (1) and, thus, keep the person in detention for long periods without giving him the opportunity of showing that there is no justification for orders being made against him. In my opinion, the validity of a provision of this nature is not to be judged from the likelihood of the abuse of the power by the Magistrate. If the Magistrate, after making orders under section 117 (3), unnecessarily postpones the inquiry, he would, in my opinion, be not only abusing his powers but will be acting contrary to the mandate of the law contained in section 117 (1) itself which, as I have indicated above, requires that the Magistrate must proceed to enquire in the truth of the information without unnecessary delay. In cases where the power is abused and the hearing is unnecessarily delayed, the proceedings would be liable to be quashed and the person set at liberty on the ground that the Magistrate has not complied with the requirements of section 117 (1). On the other hand, if the Magistrate does comply with section 117 (1) by continuing the proceedings of inquiry expeditiously and without any delay, I do not think it can be said that the detention of the person, against whom the proceedings are being taken, is not a reasonable restriction on his personal liberties when the Magistrate has already found that immediate measures are necessary for prevention of breach of the peace and the person concerned has defaulted in furnishing bonds to keep the peace during the pendency of the inquiry

56. These are the reasons why, in my opinion, the powers under section 117 (3) can be exercised without the Magistrate recording evidence and finding a *prima facie* case after starting the inquiry under section 117 (1). Even on this interpretation, section 117 (3) is valid and is a reasonable restriction under Article 19 (2), (3), (4) and (5) of the Constitution.

V.K.

——— Order accordingly.

THE SUPREME COURT OF INDIA.

(Original/Civil Appellate Jurisdiction.)

PRESENT :—*J. C. Shah, G. K. Mitter, K. S. Hegde, A. N. Grover and A. N. Ray, JJ.***Chinta Lingam and others** . Petitioners*
v.**The Government of India and others**
.. Respondents.
and**M/s. Guggila Ramaiah etc.**
.. Appellants

v.

The Union of India and others
.. Respondents.

(A) *Rice (Southern Zone) Movement Control Order (1957)—Southern States (Regulation of Exports of Rice) Order (1964) and Andhra Pradesh Rice and Paddy (Restriction of Movement) Order (1965)—Validity—If offends Article 303 of the Constitution—If confer arbitrary powers—Absence of provision for appeal or revision—Effect.*

The Control Orders, Rice (Southern Zone) Movement Control Order (1957), Southern States (Regulation of Exports of Rice) Order (1964) and Andhra Pradesh Rice and Paddy (Restriction of Movement) Order 1965), were made under section 3 of the Essential Commodities Act. The object essentially was to regulate the export and movements of rice and of rice and paddy products from the Southern States. These Control orders were laid before both Houses of Parliament as required by section 3 (6) of the Act. It has not been shown how this form of legislation would be mere executive instruction and would not constitute law made by Parliament within the meaning of Article 302 of the Constitution. No foundation was laid in the pleadings as to how the restrictions which were imposed by the Control orders were not in the public interest. It is significant that even on the point of preference of one State over another or discrimination between one State and another State there is complete absence of pleading. No argument therefore can be entertained on these matters. It is not necessary to recite the requisite opinion within section 3 (1) of the Essential Commodities Act in the Control orders.

* W.P No 212 of 1969 and C.As Nos 1802 to 1805 of 1969.
30th November, 1970.

It is implicit in the recital in the Control orders that they were being made under section 3 of the Act that the Central Government had formed the requisite opinion within sub-section (1) of that section [Para 6]

It is common ground that the officers authorised to grant permits are the District Collector and the Deputy Commissioner of Civil Supplies. These officers cannot but be regarded as fairly high rank who are expected to discharge their duties in a responsible and reasonable manner. There is a presumption that public officials would discharge their duties honestly and in accordance with rules of law and abuse of power could not be easily assumed [Para 7]

There is no bar to any of the aggrieved parties approaching the State Government by means of a representation for a final decision even if the matter has been dealt with by the District Collector or the Deputy Commissioner of Civil Supplies in the first instance and the permit has been refused or wrongly withheld by those officers. In these circumstances the absence of a provision for appeal or revision can be of no consequence. At any rate it has been pointed out in more than one decision of the Supreme Court that when the power has to be exercised by one of the highest officers the fact that no appeal has been provided for is a matter of no moment. [Para 7]

(B) *Essential Commodities Act* (X of 1955), section 3 (2) (d)—*Validity*

The question whether section 3 (2) (d) suffers from the vice of excessive delegation is no longer at large. In the *Union of India v M/s Bina Mil Gulzari Mal*, (1960) S C J 584 (1960) M L J (Cri) 349 the attack on section 3 of the *Essential Supplies (Temporary Powers) Act, 1946* which was similar in terms to section 3 of the *Essential Commodities Act* on the ground of excessive delegation was repelled. It was held that the Central Government had been given sufficient and proper guidance for exercising its powers in effectuating the policy of the statute [Para 8]

Petition under Article 32 of the Constitution of India for enforcement of the Fundamental Rights, and Appeals by Special Leave from the Judgment and

Order dated, the 16th April, 1968, of the Andhra Pradesh High Court in Writ Petitions Nos 3657 and 3658 of 1967 and 8 and 48 of 1968

Mrs Shyamla Pappu, Miss Bindra Thakur and Vinnet Kumar, Advocates, for Petitioners appellants

Jagadish Sivarup Solicitor-General of India (*R N Sachthy*, Advocate, with him) for Respondent No 1 (In all the matters)

Ram Reddy, Senior Advocate (*A V V Nay*, Advocate, with him), for Respondents Nos 2 and 3 (In C A No 1802 of 1969) Respondent No 2 (In C As Nos 1803 and 1804 of 1969) and Respondents Nos 2 to 4 (In C A No 1805 of 1969)

The Judgment of the Court was delivered by

Grover, J—The points involved in the writ petition and the appeals by Special Leave relate to the constitutionality and validity of the provisions of three Control orders issued under section 3 (2) (d) of the *Essential Commodities Act, 1955* (Act X of 1955), hereinafter called the "Act". The validity of section 3 (2) (d) of the Act itself has also been assailed.

2 The Control orders which were promulgated under section 3 (2) (d) of the Act were the following

(i) The Rice (Southern Zone) Movement Control Order, 1957,

(ii) The Southern States (Regulation of Exports of Rice) Order, 1964, and

(iii) The Andhra Pradesh Rice and Paddy (Restriction of Movement) Order, 1965

3 In the appeals the appellants had moved the High Court of Andhra Pradesh under Article 226 of the Constitution. There the petitioners were dealers in rice and rice products such as puffed, parched and beaten rice (beaten rice is known as *powa* while, parched and puffed rice is known as *Murmura*). Some of the petitioners had applied for permits to export *powa*, *murmura* and *idhirava* from the State of Andhra Pradesh to other States while others had applied for permits to transport one or other of the rice products to some places within Andhra Pradesh. The applications for permits were either rejected or were not disposed of by the authorities concerned.

In the writ petitions the High Court examined all the contentions raised exhaustively and repelled the attack on the constitutionality of section 3 (2) (d) of the Act as also the relevant clauses of the Control orders.

4. Section 3 of the Act provides :

"(1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices or for securing any essential commodity for the defence of India or the efficient conduct of military operations it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by subsection (1) an order made thereunder may provide—

(a).....

(b)

(c)

(d) for regulating by licences, permits or otherwise, the storage, transport, distribution, disposal, acquisition, use or consumption of, any essential commodity ;"

The 1957 Control Order extends to the States of Andhra Pradesh, Kerala, Madras, Mysore and Pondicherry which has been called the Southern Zone. According to clause 3 (1) no person can export or attempt to export or abet the export of rice from any place within the Southern Zone except under and in accordance with a permit issued by the State Government concerned or any officer authorised in this behalf by that Government subject to the condition that such export shall be regulated in accordance with the export quotas fixed by the Central Government. Now this Control order made a division into Southern Zone or regions in the matter of export of rice. By the Control Order of 1964 the Southern Zone or regions were further divided into four specified areas i.e., State of Andhra Pradesh, Kerala, Madras and Mysore. Clause 3 of this order prohibited the export by any

person of rice from any place within a specified area to a place outside that area except under and in accordance with the permit issued by the State Government or an officer authorised by that Government in that behalf. 'Rice' was defined by clause 2 (b) to include broken rice and paddy as also broken rice and paddy products other than bran or husk. The Control Order of 1965 imposed further restrictions on the movement of rice and paddy. By clause 3 restrictions were placed on the movement of these commodities from any place in any block to any place outside that block even within the State of Andhra Pradesh.

5. Mrs. Shyamala Pappu on behalf of the writ petitioners and the appellants before us made an attempt to raise the following contentions in respect of the Control orders :—

1. All the three Control orders offended Article 303 of the Constitution. They suffered from the vice of discrimination between one State and another and of preference to one State over another.

2. These orders were in the nature of executive instructions and did not fall within the meaning of subordinate legislation.

3. Even if the Control orders could be regarded as subordinate legislation they were not saved by Article 303 (2) in the absence of the declaration contemplated thereby.

4. The requisite opinion of the Central Government within section 3 (1) of the Act was not to be found in any of the orders.

5. The Control orders imposed unreasonable restrictions on the right of the petitioners to carry on trade as arbitrary powers had been conferred in the matter of issuing or withholding permits and there were no provisions for appeal or revision against refusal to grant a permit.

6. Article 301 in Part XIII of the Constitution declares that subject to the other provisions of this Part trade, commerce and intercourse throughout the territory of India shall be free. Under Article 302 Parliament may by law impose such restrictions on freedom of trade, commerce or intercourse between

one State and another or within any part of the territory of India as may be required in the public interest Article 303 reads —

'(1) Notwithstanding anything in Article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving or authorising the giving of any preference to one State over another, or making, or authorise the making of, any discrimination between one State and another by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule

(2) Nothing in clause (1) shall prevent Parliament from making any law giving or authorising the giving of, any preference or making or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India'

Now the Control orders were made under section 3 of the Act. The object essentially was to regulate the export and movement of rice and of rice and paddy products from the Southern States. These Control orders were laid before both Houses of Parliament as required by sub section (6) of section 3 of the Act. It has not been shown how this form of legislation would be mere executive instruction and would not constitute law made by Parliament within the meaning of section 302. No foundation was laid in the pleadings either before the High Court or in the writ petition before us as to how the restrictions which were imposed by the Control orders were not in the public interest. It is significant that even on the point of preference to one State over another or discrimination between one State and another State there is complete absence of pleading in the writ petition filed before us. The High Court adverted to the matter but we have not been shown that any proper or firm foundation was laid in the writ petition before the High Court on the question of preference or discrimination within Article 303 (1). No argument therefore can be entertained on these matters. We are unable to see the necessity of reciting the requisite opinion

within section 3 (1) of the Act in the Control orders. It is implicit in the recital in the Control orders that they were being made under section 3 of the Act that the Central Government had formed the requisite opinion within sub-section (1) of that section. This disposes of the first four contentions.

7 As regards the 5th point it is noteworthy that the permit is to be issued by the State Government concerned or any officer authorised in this behalf by that Government. It is common ground that the officers authorised by the State Government are the District Collector and the Deputy Commissioner of Civil Supplies. These officers cannot but be regarded as fairly high rank who are expected to discharge their duties in a responsible and reasonable manner. In *Messrs Dwarka Prasad Laxmi Narain v The State of Uttar Pradesh and 2 others*¹, in which the provisions of clause 4 (3) of the Uttar Pradesh Coal Control Order, 1953 which gave the licensing authority absolute power to grant or refuse to grant any licence were struck down on the ground that a law which confers arbitrary and uncontrolled power upon the executive in the matter of regulating trade or business in normally available commodities must be held to be unreasonable. There the power could be exercised by any person to whom the State Coal Controller might choose to delegate the same. The matter which has been stressed before us relates generally to the absence of any provision relating to appeal or revision in the Control Orders if the District Collector or the Deputy Commissioner of Civil Supplies refuses to grant a permit under clause 3 of the order. In *Dwarka Prasad's case*¹ the delegation could be made to any one which was certainly a relevant factor in judging the reasonableness of the impugned provision. But in the cases before us the permits is to be granted either by the State Government or by responsible officers of the rank of the District Collector or the Deputy Commissioner of Civil Supplies. Indeed, Mrs Pappu quite properly agreed that if the State Government alone had the power to issue the permits the challenge on the ground of unreasonableness of the restrictions would not be available. We

We consider that there is no bar to any of the aggrieved parties approaching the State Government by means of a representation for a final decision even if the matter has been dealt with by the District Collector or the Deputy Commissioner of Civil Supplies in the first instance and the permit has been refused or wrongly withheld by those officers. In these circumstances the absence of a provision for appeal or revision can be of no consequence. At any rate it has been pointed out in more than one decision of this Court that when the power has to be exercised by one of the highest officers the fact that no appeal has been provided for is a matter of no moment; (See *K.L. Gupta v. The Bombay Municipal Corporation and others*¹). It may also be remembered that emphasis was laid in *Pannalal Binraj v. Union of India*², on the power being vested not in any minor official but in top-ranking authority. It was said that though the power was discretionary but it was not necessarily discriminatory and abuse of power could not be easily assumed. There was moreover a presumption that public officials would discharge their duties honestly and in accordance with rules of law.

8. Lastly an effort was made to agitate the point that section 3 (2) (d) of the Act suffers from the vice of excessive delegation. This question is no longer at large. In *The Union of India and others v M/s. Bhana Mal Gulzari Mal and others*³, the attack on section 3 of the Essential Supplies (Temporary Powers) Act, 1946, which was similar in terms to section 3 of the Act on the ground of excessive delegation was repelled. It was held that the Central Government had been given sufficient and proper guidance for exercising its powers in effectuating the policy of the statute.

9 In the result the writ petition and the appeals fail and they are dismissed with costs. One set of hearing fee.

V.K. ————— *Petition and appeals dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*J C. Shah, Chief Justice, S.M. Sikri, V. Bhardwaj, K S. Hegde, A. N. Grover and I D. Dua, JJ*

Union of India ... Appellant *

v.

Jyoti Prakash Mitter ... Respondent.

(A) *Constitution of India (1950), Article 132 (1)—Certificate under—Grant of by single judge of High Court—Propriety.*

A single Judge of the High Court may in appropriate cases certify under Article 132 (1) that the case involves a substantial question of law as to the interpretation of the Constitution. But such a certificate is intended to be given in very exceptional cases where a direct appeal is necessary and in view of the grave importance of the case an early decision of the case must in the larger interest of the public or similar reasons be reached. The present case, challenging an order of the President of India, as to the age of a Judge of a High Court, was not one in which a certificate should have been asked for or granted. Against the decision of the learned single Judge, an appeal lay to a Division Bench of the High Court under the Letters Patent and no reason was suggested for not moving the High Court. [Para. 17.]

(B) *Constitution of India (1950), Article 217 (3)—Dispute as to age of a High Court Judge—Decision by the President—Proper procedure to be followed—"After consultation with Chief Justice"—Meaning of—Judge concerned if should be given a personal hearing—Jurisdiction of Court to interfere with order of President.*

Normally judicial power must be exercised by the authority in whom that power is vested. But under Article 217 (3) of the Constitution power to decide the question as to the age of a judge of the High Court has to be exercised after consultation with the Chief Justice of India. There is no substance in the contention in the present case that the decision of the President was rendered by the Chief Justice of India,

* C.A. No. 52 of 1968. 21st January, 1971.

1. (1968) 1 S.C.R. 274 at 297 : 70 Bom.L.R. 337 : (1969) 1 S.C.J. 392.
2. (1957) S.C.R. 233 at 257 : 31 I.T.R. 565.
3. (1960) 2 S.C.R. 627 : (1960) S.C.J. 584 : (1960) M.L.J. (Cri.) 349.

and not by the President. The President acted on the advice of the Chief Justice and did not surrender his judgment to the Chief Justice. The order of the President is therefore not open to challenge on the ground that he did not reach his own conclusion. [Paras 18-19]

Because the President was assisted by the machinery of the Ministry of Home Affairs in serving notices and receiving communications it cannot be inferred that he was guided by that Ministry.

[Para 21]

Any irregularity in the procedure followed by the Secretary to the President and the Secretary Ministry of Home Affairs, in sending the papers through the Minister of Home Affairs and the Prime Minister as if the matter dealt with was executive in character, does not affect the validity of the order made by the President or vitiate it on the ground that he was guided by the Minister for Home Affairs or by the Prime Minister. [Para 22]

The argument that in the instant case there was no consultation between the Chief Justice of India and the President is also without substance. Consultation contemplated by the Constitution is not a dialogue. Under Article 217 (3) the President is required to consult the Chief Justice of India before determining the question as to the age of a Judge of the High Court. The President must before deciding the age of a Judge under Article 217 (3) obtain the advice of the Chief Justice of India. For obtaining that advice the President undoubtedly must make available all the evidence in his possession to the Chief Justice. The Chief Justice has to submit his advice to the President on that evidence. It is not a condition of the validity of the decision by the President that the President and the Chief Justice should meet and discuss across a table the *pros* and *cons* of the proposed action, or the value to be attached to any piece of evidence laid before the President and made available to the Chief Justice. The procedure followed in the present case of sending to the Chief Justice the file of papers relating to the evidence against the Judge concerned and in his favour and of obtaining his advice fully complied with the constitutional requirements as to consultation with the

Chief Justice of India when he rendered his advice to the President.

[Para 23]

There is nothing in clause (3) of Article 217 which requires that the Judge whose age is in dispute, should be given a personal hearing by the President. The President may in appropriate cases in the exercise of his discretion give to the Judge concerned an oral hearing but he is not bound to do so. An order made by the President which is declared final by clause (3) of Article 217 is not invalid merely because no oral hearing was given by the President to the Judge concerned. An opportunity to make representation to the Judge after apprising him of the evidence which was likely to be used against him and consideration of the representation and the evidence comply with the requirements of Article 217 (3).

[Para 24]

In a proceeding of a judicial nature the basic rules of natural justice must be followed. But it is not necessarily an incident of the rules of natural justice that personal hearing must be given to a party likely to be affected by the order. Except in proceeding in Courts, a mere denial of opportunity of making an oral representation will not, without more vitiate the proceeding. A party likely to be affected by a decision is entitled to know the evidence against him and to have an opportunity of making a representation. He however cannot claim that an order made without affording him an opportunity of a personal hearing is invalid. The President is performing a judicial function when he determines a dispute as to the age of a Judge, but he is not constituted by the Constitution a Court. Whether in a given case the President should give a personal hearing is for him to decide. This question is left to the discretion of the President.

[Para 25]

It is true that a likelihood of prejudice is sufficient to vitiate the proceedings. But in the present case there was no likelihood of bias or of prejudice. All evidence which the President had to consider had been placed before the Judge concerned.

[Para 29]

Though the Court upheld the validity of the order of the President under Article

217 (3), it made the following observations :

"We recommend that even in the matter of serving notice and asking for representation from a Judge of the High Court where a question as to his age is raised, the President's Secretariat should ordinarily be the channel, that the President should have consultation with the Chief Justice of India, and that there must be no interposition of any other body or authority, in the consultation between the President and the Chief Justice of India. Again we are of the view that normally an opportunity for an oral hearing should be given to the Judge whose age is in question and the question should be decided by the President on consideration of such materials as may be placed by the Judge concerned and evidence against him after the same is disclosed to him. The President acting under Article 217 (3) performs a judicial function of grave importance under the scheme of our constitution. He cannot act on the advice of his Ministers. Notwithstanding the declared finality of the order of the President the Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral considerations or the rules of natural justice were not observed or that the President's judgment was coloured by the advice or representation made by the executive or it was founded on no evidence. Appreciation of evidence is entirely left to the President and it is not for the Courts to hold that on the evidence placed before the President on which the conclusion is founded, if they were called upon to decide the case they would have reached some other conclusion.

[*Para. 30*]

Appeal from the Judgment and Order dated the 7th/8th August, 1967 of the Calcutta High Court in Civil Rule No. 1798 (W) of 1966.

Jagadish Swarup, Solicitor-General of India (*Ram Panyam* and *S P. Nayar*, Advocates, with him), for Appellant.

Respondent in person.

The Judgment of the Court was delivered by

Shah, C.J.—Joyti Prakash Mitter—herein after called 'the respondent'—was a candi-

date for the Matriculation certificate examination of the Bihar University, held in April, 1918. In the Bihar Government Gazette declaring him successful the age of the respondent was shown to be 16 years 3 months in April, 1918. The respondent offered himself as a candidate for admission to the Indian Civil Service at an examination held in 1923, by the United Kingdom Civil Service Commission. On that occasion he declared that his date of birth was 27th, December 1901. The respondent joined the High Court Bar at Calcutta in May, 1931. On 11th February 1949, the respondent was appointed an Additional Judge and on 26th, December 1949 he was recommended for appointment as a permanent Judge. He then declared that he was 45 years of age.

2 In 1956, the Government of India collected information relating to the educational and other qualifications of the Judges of the High Courts and their respective dates of birth. The declaration made by the respondent that his date of birth was 27th, December 1904 was accepted. The Government of India having received information that the true date of birth of the respondent was 27th December 1901, commenced an enquiry. On 17th April, 1959, the Chief Justice of the High Court of Calcutta asked the respondent to make a formal statement relating to his date of birth. On 27th May, 1959, the respondent wrote to the Chief Justice of the High Court, Calcutta that his age entered in the Matriculation certificate was incorrect, and that he was shown to be three years older than he actually was, because a true declaration of his age would have prevented him from appearing for the Matriculation examination in 1918. The respondent also tendered an affidavit of one Panchakari Banerjee that the question of his age was discussed with Sir Arthur Trevor Harries who was in 1949, the Chief Justice of the High Court of Calcutta.

3 A suggestion made by the Chief Minister of West Bengal that the respondent may agree to abide by the decision of the Chief Justice of India, on the question of his true date of birth was not accepted by him. The respondent also did not furnish any material in support of his case that he was born in December, 1904. By order dated 15th May, 1961, the

President of India on the recommendation of the Minister of Home Affairs directed that the age of the respondent be determined on the basis of the date of birth declared in the Matriculation certificate

4 The respondent then moved a petition in the High Court of Punjab at Delhi for a declaration that he was entitled to hold office till 27th December 1964 and for a writ of *mandamus* restraining the Union of India from giving effect to the order of the President. The petition was dismissed. The respondent then filed a petition on 2nd January 1962 in the High Court of Calcutta impleading the Chief Justice of the High Court of Calcutta as a party respondent praying for an order directing the Chief Justice to treat him as continuing in office till 27th December 1964, and "to assign judicial work" to him. He urged that the decision of the Government of India in pursuance of which the Chief Justice of the High Court had acted was "illegal arbitrary and unconstitutional" and that the Chief Justice had no jurisdiction to act upon that decision. That petition was dismissed *in limine*. But a Special Bench of the High Court in appeal filed by the respondent directed that rule nisi be issued. This Court dismissed an appeal against the order of the High Court. *Hon ble Mr Himansu Kumar Bose, Chief Justice, High Court, Calcutta and another v Jyoti Prakash Mittal*¹. A Special Bench of five Judges of the Calcutta High Court then heard the petition. The petition filed by the respondent was ordered to be dismissed and the rule was discharged. This Court in appeal against the order of the High Court. *Jyoti Prakash Mittal v Hon ble Mr Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and another*², gave certain directions. To appreciate the reasons for making those directions it is necessary to take into account certain developments.

5 When the appeal was pending in this Court, Article 217 of the Constitution was amended by the Constitution (Fifteenth Amendment) Act, 1963 and clause (3) was added thereto the following effect with retrospective effect

shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final'

Clause (1) of Article 217 was also amended by the Constitution (Fifteenth Amendment) Act 1963, with effect from 5th October, 1963 and the age of superannuation of Judges of the High Court was fixed at sixty-two years

6 This Court held that clause (3) of Article 217 having retrospective operation, validity of the order passed by the President must be adjudged in the light of clause (3) of Article 217 and since the Ministry of Home Affairs had placed the file before the President in accordance with the rules of business, the procedure could not be assimilated to the requirements of Article 217 (3). The Court observed

"The question concerning the age of the appellant (respondent herein) on which a decision was reached by the President on 15th May, 1961, affects the appellant in a very serious manner, and so, we think considerations of natural justice and fair play require that before this question is determined by the President, the appellant should be given a chance to adduce his evidence. That is why we think that, on the whole, it would not be possible to accept the Attorney General's contention that the order passed by the President on 15th May, 1961, can be treated as a decision within the meaning of Article 217 (3). We ought to make it clear that in dealing with the grievance of the appellant that his evidence was not before the President at the relevant time, we are not prepared to hold that his failure or refusal to produce evidence at that stage should be judged in the light of the retrospective operation of Article 217 (3), such a consideration would be totally inconsistent with the concept of fair-play and natural justice which ought to govern the enquiry contemplated by Article 217 (3)."

and that

'The appellant has contended before us that if we hold that the impugned

1 A.I.R. 1964 SC 1636

2. (1965) 2 S.C.R. 53

decision of the President does not amount to a decision under Article 217 (3), he is entitled to have a formal decision of the President in terms of the said provision. The Attorney-General has conceded that this contention of the appellant is well founded. He, therefore, stated to us on behalf of the Union of India, that in case our decision on the main point is rendered against the Union of India, the Union of India will place the matter before the President within a fortnight after the pronouncement of our judgment inviting him to decide the question about the appellant's age under Article 217 (3). Both parties have agreed before us that in case the decision of the President is in favour of the appellant, the appellant will be entitled to claim that he has continued to be a Judge notwithstanding the order passed by the Chief Justice of the Calcutta High Court and will continue to be a Judge until he attains the age of superannuation."

7. Thereafter the President of India directed the Secretary, Ministry of Home Affairs, to call upon the respondent to "make such representation as he may wish to make in the matter and produce such evidence as he may desire to produce in support of his claim that his correct age should be determined on the basis of his date of birth being taken as 27th December, 1904", and after consulting the Chief Justice of India by order dated 29th September, 1965, determined the date of birth of the respondent as 27th December, 1901.

8. The legality of the procedure followed by the President in making the order is challenged by the respondent. It is, therefore, necessary to set out in some detail the various steps taken before passing that order. On 17th November, 1964 the Secretary of the Ministry of Home Affairs drew up a note tracing the history of the litigation upto the decision of this Court, and invited the President to determine the age of the respondent under Article 217 (3). The note of the Secretary was submitted to the President through the Minister of Home Affairs and the Prime Minister. On 21st November, 1964 the President signed an order calling upon the respondent to make

such representation as he may wish to make in the matter and to produce such evidence as he may desire. The respondent submitted his representation on 7th December, 1964 and annexed therewith photostat copies of two documents an almanac and a horoscope on which he relied and certain affidavits. By his forwarding letter the respondent prayed for an oral hearing before the President to enable him "to adduce his evidence and to produce in original the documents in the Annexures and to make submissions in support of his case." The respondent repeated his request for oral hearing by a letter addressed to the Secretary to the President on the same day. On 9th December, 1964 the Secretary to the Ministry of Home Affairs wrote to the respondent asking him to send the original documents copies of which were annexures to his representation to enable him—the Secretary to place them before the President. On the same date, the Secretary to the Ministry of Home Affairs also supplied to the respondent a copy of his note dated 17th November, 1964, seeking the determination of the President, and copy of the President's directive dated 21st November, 1964. After receiving the copies the respondent by letter dated 10th December, 1964 submitted an additional representation. On the same date the respondent submitted to the Secretary, Ministry of Home Affairs, documents in original relied upon by him in his representation. On 14th December, 1964 the respondent addressed a letter to the Secretary to the President, forwarding a copy of his additional representation, with a request that representation together with the original documents, which he had handed over to the Ministry of Home Affairs, be called for from that Ministry and be placed before the President. On 21st December, 1964 the Secretary, Ministry of Home Affairs sent a reply to the letter directing the respondent to send all the evidence that he desired to rely upon and informing him that no oral evidence of witnesses will be received, the respondent being free to submit affidavits of witnesses. Referring to his request for personal hearing it was stated in the letter that the President will decide after considering the evidence produced by the respondent whether any personal hearing would be necessary, and that "should he decide that you should be heard in person, you will be informed

in due course" On 31st December, 1964 the originals of the horoscope and the almanac submitted by the respondent were sent to the Director of the Central Forensic Institute, Calcutta by the Ministry of Home Affairs with the request that the horoscope and the entry in ink in the margin of the almanac be examined with a view to determine its genuineness with particular reference to the age of the paper on which the horoscope had been prepared, the age of the ink used, and the age of the writing with a similar report as to the genuineness of the entry in ink in the almanac. On 4th January, 1965 the respondent submitted four additional affidavits including his own affidavit affirming that the writing on the margin of the almanac against the date 12 *Paus*, 1311 *BS*, was that of his maternal uncle Jadunath Bose, who had died when he the respondent was a student of Oxford. By his letter dated 3rd February, 1965 addressed to the Secretary, Ministry of Home Affairs, the respondent protested against the reference of the documents to the expert, contending that the documents were obtained from him on the representation that they "were required to be placed before the President." The respondent demanded that he be supplied a copy of the order of the President by which such reference to the expert had been made and also copies of the correspondence between the Home Ministry and the forensic expert. He also requested that the originals of the documents be returned to him so that he might have them examined by an independent expert, who would after his examination give evidence as to his opinion, by affidavit or otherwise. In reply to that letter, the Secretary, Ministry of Home Affairs, wrote that the procedure to be followed and the opportunities to be given to the respondent depended entirely upon the discretion of the President and the question of returning the documents produced by the respondent before determination of the matter, pending before the President did not arise at that stage. The respondent was also informed that the question whether he should have an opportunity of filing expert evidence will be considered in due course. He was also informed that the respondent will be given an opportunity to put forward his case about the evidentiary value of the documents produced by him

and any decision thereon would be arrived at by the President after affording him reasonable opportunities in that behalf.

9 There was some correspondence between the Director of the Central Forensic Institute, Calcutta and the Ministry of Home Affairs. The Commandant of the Institute opined that it was 'extremely difficult to solve dating problems in a completely satisfactory manner'. He initially sought instructions whether he was at liberty to deface or mutilate the documents, because the "test required could not be made without extracting parts of the documents, but later wrote that the mutilation of documents by the chemical test was not desirable and moreover that by such application it would not be possible to give an absolute date to the document. Thereafter the Director reported on a "limited examination" that could be carried out that it was not possible to give any opinion relating to the age of the ink writing on the almanac, but in his view the horoscope could not have been written earlier than 1909 because the paper on which it was written contained bamboo pulp which was not brought into the use by the Titaghur Mills in the manufacture of paper before 1912. The Director said nothing about the age of the ink in which the horoscope had been written.

10 After consultations between the Ministry of Home Affairs and the Ministry of Law, the Home Ministry sent certain old writings of the year 1904, 1949, 1950 and 1959 and requested the Director to determine the age of the writing of the disputed horoscope and marginal note in the almanac by comparison. The Director on 17th April, 1965 wrote that it "was impossible to give any definite opinion by such comparisons particularly when the comparison writing were not made with the same ink on similar paper and not stored under the same conditions as the documents under examination", and that it "will not be possible for a document expert, however reputed he might be anywhere in the world to give any definite opinion on the probable date of the horoscope and the ink writing in the margin of the almanac".

11 After receiving the second report from the Director, the Ministry of Law raised the question about the opportunity

to be given to the respondent before the President in the enquiry for determining the age of the respondent under Article 217 (3). It was then decided to refer the question to the Chief Justice of India for his advice. On 24th July, 1965 the Chief Justice of India advised the President about the procedure to be adopted in the determination of the age of the respondent. Thereafter pursuant to a suggestion made by the Law Minister the Ministry of Home Affairs wrote to the respondent on 31st July, 1965 requiring him to state the date or year of the horoscope. The respondent by his letter dated 4th August, 1965, stated that it was not possible for him to give definitely the date or year of the horoscope but he asserted that it was at least in existence in the year 1921 when it was consulted on the occasion of his marriage. On 23rd February, 1965 the respondent addressed a telegram to the President requesting that an early decision of the question of his age may be reached. On 15th March, 1965 he addressed another telegram to the President requesting leave to produce other documentary evidence which he claimed may be available in East Pakistan, but sometime thereafter he informed the Secretary, Ministry of Home Affairs, that owing to lack of co-operation on the part of the people in East Pakistan it was not possible to get the evidence which was mentioned in his letter to the President and that he must content himself with the evidence he had already produced and which in his view was "overwhelming". He further stated :

"You can, therefore, take it that I have no further evidence to produce on the subject of my age, unless I am driven to call an expert or experts as indicated by me in my letter to you, dated 3rd February, 1965".

On 13th August, 1965, copies of the reports of the Director of the Forensic Science Laboratory were forwarded by the Home Secretary to the respondent with a forwarding letter by which respondent was informed that if he had any comments to make on the opinion expressed by the Director they may be submitted and that if the respondent desired he may also adduce evidence in rebuttal in the form of expert opinion supported by proper affidavit, and that the comments, evidence and affidavits, if

any, may be sent within one month of the letter. On receipt of the letter of the Home Secretary the respondent sent a telegram addressed to the Home Secretary on 1st September, 1965, praying that the President may call for all papers and documents, if not already sent for and grant him an audience, "if at all necessary". The respondent also wrote a letter on that day submitting that the evidence tendered by him was "conclusive" and there was no question of adducing any further evidence or any evidence in rebuttal. He also submitted that the entry in the Bihar and Orissa, *Gazette* (declaring him successful at the matriculation examination) was erroneous and concluded the letter that all relevant documents be placed before the President, and that the President "may be graciously pleased to grant 'him' an audience for the purpose of deciding the question of his age".

12. The file of the respondent's case was then submitted to the President. On 16th September, 1965 the President referred the matter to the Chief Justice of India asking him for his advice. On 28th September, 1965 the Chief Justice recommended that the age of the respondent be decided on the basis that the respondent was born on 27th December, 1901. The Chief Justice set out in detail all the evidence including the reports of Dr. Iyengar, Director of the Central Forensic Science Laboratory, Calcutta, bearing on the dispute as to the true date of birth of the respondent. The Chief Justice of India thereafter observed:

"..... the question which the President has to decide is whether the date of Mr. Mitter's birth mentioned on the occasions when he appeared for the Matriculation Examination as well as for the Indian Civil Service Examination, is incorrect; and that would naturally turn upon whether it is shown that the entry in ink on the margin of the almanac showing that Mr. Mitter was born on 27th December, 1904, was contemporaneously made and is correct as alleged by him. The horoscope on which Mr. Mitter relies refers to the date and time of his birth; but that does not help Mr. Mitter very much, because it is obviously based upon information given to Jyotish-Sastri Shri Jogesh Chandra Deba Sarma in the basis of the entry

in the almanac. I have carefully considered the reports made by Dr Iyengar the comments on them made by Mr Mitter, the affidavits on which Mr Mitter relies, and the almanac and the horoscope on which he bases his case. I have also taken into account all the other relevant facts relating to the past history of his dispute, the conduct of Mr Mitter, the grounds on which he challenged the earlier orders passed in this matter, and I have come to the conclusion that it is not shown satisfactorily that the entry in ink on the margin of the almanac was made contemporaneously and is correct as alleged by Mr Mitter. I am therefore, unable to accept his case that the date of his birth which was shown at the time when he appeared for the Matriculation Examination as well as for the I C S Examination 'was exaggerated'.

I would, therefore, advise the President to hold that Mr Mitter has failed to show that he was born on 27th December, 1904 and not on 27th December, 1901, and that the question about his age should be decided on the basis that he was born on 27th December, 1901.

The file containing the advice was then returned to the President. It appears however that after the file was received in the President's Secretariat it was sent to the Secretary, Ministry of Home Affairs for putting it up before the Home Minister before submitting it to the President. The Home Secretary on 29th September, 1965 put up the matter before the Home Minister with the following endorsement:

"A summary of the case will be found at slip 'Z'. The Chief Justice of India has offered his advice in his minute after going into the relevant material. H M (Home Minister) may recommend to the President that the age of Sri J P Mitter may be determined in accordance with the advice of the Chief Justice of India."

The Home Minister and the Prime Minister counter signed that endorsement. The file was then placed before the President on the same day, i.e., 29th September, 1965. The President recorded his decision that he accepted "the advice tendered by the Chief Justice of India and 'decided' that the age of Sri Jyoti Prakash Mitter should be determined on

the basis that he was born on the twenty seventh December, nineteen hundred and one."

13 The Secretary, Ministry of Home Affairs, communicated the decision of the President to the respondent. On 15th October, 1965 the respondent addressed a letter to the President praying that the decision which had been made without affording him an audience should be reopened and that he should be granted an audience in the presence of the Chief Justice of India and a representative of the Home Ministry. The Home Secretary informed the respondent that the President's decision was final and could not be reopened. He also pointed out that though the respondent was offered the opportunity of commenting on the opinion of the Government expert, he—the respondent—had by his letter of 1st September, 1965 declined that offer.

14 On 3rd August, 1966, the respondent moved the petition out of which this appeal arises claiming a writ in the nature of *mandamus* commanding the Union of India (i) to act and proceed in accordance with law, (ii) to rescind, recall and withdraw the purported decision of the President conveyed to him by the Secretary to the Government of India in his letter dated 13th October 1965, and (iii) to forbear from giving effect or further effect to the purported decision of the President.

15 The petition was heard by D D Basu J. After an elaborate discussion of the history of the dispute and decisions of the Courts in India and abroad, under diverse heads, the learned Judge concluded:

that "the impugned order of the President, the purport of which was communicated to the petitioner (respondent) by the letter of the Home Secretary, dated 13th October, 1965 is not a 'decision of the President' in term of Article 217 (3), because—

(A) Whether the function is quasi-judicial or administrative he acted as recommended by the Home Minister and the Prime Minister, who are extraneous to the function under Article 217 (3),

(B) The function being quasi-judicial—
(i) the President was not given sufficient time and opportunity to exercise

his independent judgment on the question before him;

(ii) the petitioner was not given a personal hearing before the President, as called for by the circumstances of the case.

(C) The jurisdiction of this Court to interfere on the above grounds is not barred by the finality clause under Article 217 (3)".

He directed the Union of India not to give effect to the order of the President as communicated by the letter of the Home Secretary dated 13th October, 1965. The learned Judge observed that the Union of India, may, if so advised, place the matter before the President again, within two months from the date of the judgment, inviting him to decide the age of the respondent in accordance with Article 217 (3).

16. On behalf of the Union of India a prayer for a certificate under Article 132 (1) of the Constitution was made. Observing that the case involved a substantial question of law as to the interpretation of Article 217 (3) of the Constitution, D. D. Basu, J. granted the certificate prayed for under Article 132 (1) of the Constitution. This appeal is filed pursuant to that certificate.

17. Under Article 132 (1) of the Constitution an appeal lies to the Supreme Court from any judgment, decree or final order of a High Court, whether in a civil, criminal or other proceedings, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution. A single Judge of the High Court may in appropriate cases certify that the case involves a substantial question of law as to the interpretation of the Constitution. But such a certificate is intended to be given in very exceptional cases where a direct appeal is necessary and in view of the grave importance of the case an early decision of the case must in the larger interest of the public or similar reasons be reached. This case was not one in which a certificate should have been asked for or granted. Against the decision of the learned Judge, an appeal lay to a Division Bench of the High Court under the Letters Patent and no reason was

suggested for not moving the High Court. The order of the President was made in 1961. The respondent could not on the date of the order be reinstated because he was even on his case more than 62 years of age. Since, however, a certificate was asked for on behalf of the Union of India and has been given, we have not thought it necessary to vacate the certificate and to ask the Union to have resort to the normal remedy of an appeal to the High Court.

18. Article 217 (3) incorporated by the Fifteenth Amendment Act in the Constitution was given retrospective effect from 26th January, 1950. On that account all questions arising as to the age of a Judge of the High Court had to be decided by the President after consultation with the Chief Justice of India. A dispute relating to the age of the respondent who was a Judge of a High Court in India was raised and the President of India after consultation with the Chief Justice of India decided that question. Normally judicial power must be exercised by the authority in whom that power is vested. But under Article 217 (3) power to decide the question as to the age of a Judge of the High Court has to be exercised after consultation with the Chief Justice of India.

19. There is no substance in the contention of the respondent, who argued his case personally that the decision was in truth rendered by the Chief Justice of India and not by the President. The President has expressly recorded that he accepted the advice tendered by the Chief Justice of India and that he decided that the age of the respondent he determined on the basis that the respondent was born on the 27th December, 1901. The President acted on the advice of the Chief Justice; he did not surrender his judgment to the Chief Justice. The order of the President is not open to challenge on the ground that he did not reach his own conclusion.

20. It was, then urged that in rendering his decision there was no consultation between the President and the Chief Justice as required by the Constitution; that the President was guided by the Minister of Home Affairs and by the Prime Minister; that the President did not apply his mind to the evidence in the case; that it was obligatory upon the

President to grant to the respondent an oral hearing and since he did not do so the order was liable to be declared invalid, that in any case the respondent had requested on several occasions that an opportunity be given to him of an oral hearing before deciding the case and that the case was otherwise one in which an oral hearing should have been given, that the executive was closely associated with the President in making the order, since the notice to the respondent was issued through the Ministry of Home Affairs and the papers were sent by the Chief Justice of India to the President but were diverted by the Secretary to the President to the Ministry of Home Affairs and after they were received with the advice of the Chief Justice of India they were considered by the Minister of Home Affairs and the Prime Minister and it was only after they assented to the advice of the Chief Justice of India that the papers were submitted to the President and that the part played 'by the Chief Justice of India was contrary to all principles of natural justice'

21 We do not propose to deal with those contentions in the sequence in which they were urged before us for many of those contentions overlap. It is true that the notice requiring the respondent to show cause was issued pursuant to the papers being submitted to the President and the notice was in fact sent by the Secretary to the Ministry of Home Affairs. But we do not think that because the President was assisted by the machinery of the Ministry of Home Affairs in serving notices, and receiving communications addressed by him it can be inferred that he was guided by that Ministry. Apparently no rules have been framed regarding the enquiry to be made by the President of India under Article 217 (3). This was the first case which arose in which the question of age of a Judge of the High Court had to be decided. The President has no secretarial facilities for serving notices and for taking other steps in regard to enquiries to be made under Article 217 (3).

22 After the Chief Justice of India sent the file of papers with his advice to the President, the papers were not immediately submitted to the President but were sent to the Ministry of Home Affairs.

The Secretary recorded a note requesting the Minister of Home Affairs to recommend to the President that the age of the respondent may be determined in accordance with the advice of the Chief Justice of India. The Minister for Home Affairs and then the Prime Minister placed their initials below the note. There is nothing in the order that the Minister for Home Affairs acted upon the request made by the Secretary, he merely countersigned the papers and sent them to the Prime Minister who also countersigned the note. The argument that the Home Minister and the Prime Minister signified their assent and thereafter the President acted as if he was exercising the executive authority on the advice of his Ministers has no force. There is no reason to think that the Minister for Home Affairs or the Prime Minister acted in pursuance of the request made by the Secretary. There is again nothing in the order of the President which may suggest that he was swayed by anything which the Secretary to the Ministry of Home Affairs had noted or by the signatures of the Minister for Home Affairs or the Prime Minister. The terms of the order of the President are clear: they show that the President was acting on the advice of the Chief Justice of India and that he decided the age of the respondent on that basis. Any irregularity in the procedure followed by the Secretary to the President and the Secretary, Ministry of Home Affairs, in sending the papers through the Minister of Home Affairs and the Prime Minister as if the matter dealt with was executive in character, does not, in our judgment, affect the validity of the order made by the President or vitiate it on the ground that he was guided by the Minister for Home Affairs or by the Prime Minister.

23 The argument that there was no consultation between the Chief Justice of India and the President is also without substance. Consultation contemplated by the Constitution is not a dialogue. Under Article 217 (3) the President is required to consult the Chief Justice of India before determining the question as to the age of a Judge of the High Court. The President must before deciding the age of a Judge under Article 217 (3) obtain the advice of the Chief Justice of India. For obtaining that advice the President undoubtedly must make avail-

able all the evidence in his possession to the Chief Justice of India. The Chief Justice has to submit his advice to the President on that evidence. It is not a condition of the validity of the decision by the President that the President and the Chief Justice should meet and discuss across a table the *pros* and *cons* of the proposed action, or the value to be attached to any piece of evidence laid before the President and made available to the Chief Justice. The procedure followed in the present case of sending to the Chief Justice of India the file of papers relating to the evidence against the respondent and in his favour, and of obtaining his advice fully complied with the constitutional requirements as to consultation with the Chief Justice of India when he rendered his advice to the President.

24. The President had given ample opportunities at diverse stages to the respondent to make his representation. All evidence placed before the President when he considered the question as to the age of the respondent was disclosed to him and he—respondent—was given an opportunity to make his representation thereon. There is nothing in clause (3) of Article 217 which requires that the Judge whose age is in dispute, should be given a personal hearing by the President. The President may in appropriate cases in the exercise of his discretion give to the Judge concerned an oral hearing but he is not bound to do so. An order made by the President which is declared final by clause (3) of Article 217 is not invalid merely because no oral hearing was given by the President to the Judge concerned. An opportunity to make representation to the Judge, after apprising him of the evidence which was likely to be used against him and consideration of the representation and the evidence comply with the requirements of Article 217 (3). The respondent it is true did make requests that the President should give him an oral hearing. The respondent claims that his request was granted and he remained under an impression that he would be given an oral hearing, and the order made without granting him an opportunity of an oral representation was contrary to the rules of natural justice. By his representation dated 7th December, 1964,

the respondent had requested that he be given an oral hearing before the President and an opportunity to adduce his evidence and to produce in original the documents, *viz.* an almanac and a horoscope, and to make submission in support of his case. He repeated that request in the letter addressed to the Secretary to the President also on the same day. In reply thereto by letter dated 21st December, 1964, the Secretary to the Ministry of Home Affairs informed the respondent that no oral evidence of witnesses would be received but the respondent was free to submit the affidavits of witnesses as he relied upon. Regarding his request for the personal hearing the respondent was informed that the President will decide after considering the evidence whether any personal hearing was necessary. He was also informed that should the President decide that the respondent should be heard in person, he will be informed in due course. Again in reply to the letter written by the respondent on 4th January, 1965, the Secretary to the Ministry of Home Affairs informed the respondent that the procedure to be followed and the opportunities to be given to the respondent were entirely to depend upon the direction of the President and the respondent will be given an opportunity to put forward his case about the evidentiary value of the documents produced by him and any decision thereon would be arrived at by the President after affording him reasonable opportunities in that behalf. By his letter dated 28th April, 1965, to the Secretary, Ministry of Home Affairs, the respondent stated that he had no further evidence to produce on the subject of his age, beside the evidence he had already produced. By his telegram dated 1st September, 1965, the respondent requested the President to send for the papers and documents, if not already sent for, and to grant him an audience "if at all necessary". But in his letter addressed to the Secretary of the Ministry of Home Affairs on the same day he stated that all the papers may be placed before the President and the President may be "pleased to grant an audience for the purpose of deciding the question of his age."

25. Article 217 (3) does not guarantee a right of personal hearing. In a pro-

ceeding of a judicial nature, the basic rules of natural justice must be followed. The respondent was on that account entitled to make a representation. But it is not necessarily an incident of the rules of natural justice that personal hearing must be given to a party likely to be affected by the order. Except in proceedings in Courts, a mere denial of opportunity of making an oral representation will not, without more, vitiate the proceeding. A party likely to be affected by a decision is entitled to know the evidence against him, and to have an opportunity of making a representation. He however cannot claim that an order made without affording him an opportunity of a personal hearing is invalid. The President is performing a judicial function when he determines a dispute as to the age of a Judge but he is not constituted by the Constitution a Court. Whether in a given case the President should give a personal hearing is for him to decide. The question is left to the discretion of the President to decide whether an oral hearing should be given to the Judge concerned. The record amply supports the view that the President did not deem it necessary to give an oral hearing. There were no complicated questions to be decided by the President. On the one hand there was the evidence of the matriculation certificate and the representation made by the respondent before the Board of Commissioners in the United Kingdom when the respondent submitted himself for being admitted to the Indian Civil Service Examination. On the other hand there was the evidence of the assertion made by the respondent that he was born on 27th December, 1924 which was sought to be supported by the almanac with an entry in the margin, a horoscope, an affidavit of Panchkari Banerjee, Secretary to the then Chief Justice Sir Arthur Trevor Harries in which it was stated that the question about the age of the respondent was discussed with the Chief Justice. The truth of the statements made by the respondent had to be judged in the light of his conduct that he gave no evidence of the date of his birth when he was appointed permanent Judge of the High Court nor when in 1960 opportunity was given to him to furnish material in support of his contention regarding his age. If upon this evidence the President

was of the view that the disputed question may be decided without giving an opportunity of personal hearing, this Court cannot set aside the order on the ground that the order was made without following the rules, of natural justice.

26 It was urged that the President left India in the afternoon of 29th September, 1965 on a tour of East European countries and that he had not sufficient time to consider the advice tendered by the Chief Justice of India and of going through all the evidence which was placed before him and of giving any judicial consideration to the matter before him. Having regard to the "strict time table" which was required to be observed, it was urged that the President treated the matter as formal, and guided by the advice of the Home Minister and the Prime Minister he mechanically accepted the advice of the Chief Justice of India and surrendered his own judgment to the judgment of the Chief Justice of India. But on this part of the case there is no reliable evidence. No such ground was raised in the High Court. In this Court in the affidavit in reply filed by the respondent on 24th February, 1967, in answer to the additional affidavit of the Union of India the respondent stated two new grounds (1) that the Chief Justice of India had privately advised the Ministry of Home Affairs as to the conduct of the enquiry or reference under Article 217 (3) of the Constitution and he was on that account disentitled to tender advice to, or to be consulted by, the President under Article 217 (3), and that the "part played by the Chief Justice of India relative to the reference was against all principles of natural justice and fair play and vitiated his own purported advice to the President as well as the purported decision of the President rendering the purported decision a nullity", and (2) that "the President of India left New Delhi shortly after noon on 29th September, 1965, on a tour of East European countries and Ethiopia and that shortly before his departure a relative to the said reference was placed before him for his signature in token of his purported decision as to the respondent's age with the recommendation of the Prime Minister and the Home Minister to determine the age of the respondent in accordance with the advice of the Chief Justice of India".

He annexed thereto a copy of the daily edition of the Statesman dated 30th September, 1965, evidencing the departure of the President as aforesaid and his purported decision as to the question of the age of the respondent before his departure for Europe. But no attempt was made to have the matter investigated in the High Court as to when the papers were submitted to the President and what consideration he gave to the advice, whether he made only a mechanical approach believing that he was bound to accept the advice of his Ministers. These are matters which cannot be canvassed for the first time in this Court.

27. On the plea that the Chief Justice of India had improperly advised the Minister of Home Affairs as to the conduct of enquiry and the reference, and on that account he had disentitled himself to tender any advice to the President also no allegation was made in the petition and no argument was raised in the High Court. There is no evidence that beside tendering advice to the President in matters of procedure and the final decision, the Chief Justice of India had given any advice to the Ministry of Home Affairs privately or otherwise. The argument that the Chief Justice of India in tendering the advice was influenced by extraneous considerations is not founded upon any materials placed before this Court and must be rejected.

28. The respondent invited our attention to a judgment of the Judicial Committee in *B. Surinder Singh Kanda v. Government of the Federation of Malaya*¹. In that case the Commissioner of Police, Malaya passed an order dismissing one Kanda, an Inspector of Police, on the ground that at an inquiry before an adjudicating officer Kanda was found guilty of failing to disclose evidence at a criminal trial. Kanda contended that after the coming into force of the Constitution of Malaya that power was only in the Police Service Commission, to which the Commissioner was a subordinate authority and that failure to supply him a copy of the report of the board of inquiry which contained matters highly prejudicial to him and which had been sent to and read by the adjudicating officer before he sat to inquire into the

charge, amounted to a failure to afford the appellant Kanda "a reasonable opportunity of being heard", in answer to the charge within the meaning of Article 135 (2) of the Constitution of Malaya and to a denial of natural justice. Lord Denning who delivered the judgment of the Judicial Committee considered the question whether the hearing by the adjudicating officer was vitiated because that officer was furnished with the report without Inspector Kanda being given any opportunity of correcting or contradicting it. Before the High Court of Malaya the question posed was whether there was a real likelihood of bias, that is "an operative prejudice, whether conscious or unconscious" on the part of the adjudicating officer. The Court of Appeal held that there was no likelihood of bias. In the opinion of Lord Denning however the proper approach to the case was different. "The rule against bias is one thing. The right to be heard is another point. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it * * * * *". But they are separate concepts and are governed by separate considerations. In the present case Inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard:

28-A. If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him and then he must be given a fair opportunity to correct or contradict them. * * * * * It follows, of course; that the Judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the Judge without his knowing.

29 Relying upon the observation the respondent contended that a likelihood of prejudice is sufficient to vitiate the proceedings. But in this case we do not think that there was any likelihood of bias or of prejudice. All evidence which the President had to consider had been placed before him at diverse stages. When the notice to show cause was issued, the President had *prima facie* material before him. Thereafter certain other evidence was collected and that was also placed before the President. It is not suggested that any evidence against the respondent was not disclosed to him. The principal argument raised by the respondent was that the President himself did not determine the question relating to the age of the respondent because he surrendered his judgment to the Chief Justice of India or that he was persuaded to reach his conclusion only because the Home Minister and the Prime Minister had countersigned the notation made by the Secretary of the Ministry of Home Affairs. We do not think that the President had heard any evidence or received any representation from one side behind the back of the other. If he had done so the question whether any representation was made which worked to the prejudice of the respondent would arise. The Court will not then consider the question whether the representation had in fact worked to his prejudice. A reasonable possibility may be sufficient. In the present case no evidence was placed before the President or considered by him which was not disclosed to the respondent. The principle in *B. Surinder Singh Kanda's case*¹ has therefore no application.

30 It is necessary to observe that the President in whose name all executive functions of the Union are performed is by Article 217 (3) invested with judicial power of great significance which has bearing on the independence of the Judges of the higher Courts. The President is by Article 74 of the Constitution the constitutional head who acts on the advice of the Council of Ministers in the exercise of his functions. Having regard to the very grave consequences resulting from even the intimation of an enquiry relating to the age of a Judge, our Constitution-makers have thought it necessary to

invest the power in the President in the exercise of this power if democratic institutions are to take root in our country, even the slightest suspicion or appearance of misuse of that power should be avoided. Otherwise independence of the judiciary is likely to be gravely imperilled. We recommend that even in the matter of serving notice and asking for representation from Judge of the High Court where a question as to his age is raised, the President's Secretariat should ordinarily be the channel, that the President should have consultation with the Chief Justice of India as required by the Constitution and that there must be no interposition of any other body or authority in the consultation between the President and the Chief Justice of India. Again we are of the view that normally an opportunity for an oral hearing should be given to the judge whose age is in question, and the question should be decided by the President on consideration of such materials as may be placed by the Judge concerned and the evidence against him after the same is disclosed to him. The President acting under Article 217 (3) performs a judicial function of grave importance under the scheme of our Constitution. He cannot act on the advice of his Ministers. Notwithstanding the declared finality of the order of the President the Court has jurisdiction in appropriate cases to set aside the order if it appears that it was passed on collateral considerations or the rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the executive or it was founded on no evidence. But this Court will not sit in appeal over the judgment of the President, nor will the Courts determine the weight which should be attached to the evidence. Appreciation of evidence is entirely left to the President and it is not for the Courts to hold that on the evidence placed before the President on which the conclusion is founded, if they were called upon to decide the case they would have reached some other conclusion.

31 The appeal is allowed. Having regard however to the circumstances of the case, we direct that there will be no order as to costs.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—*M. Hidayatullah, C.J., J. M. Shelat, G. K. Mitter, C. A. Vaidialingam and A. N. Ray, JJ.*Madhu Limaye and another *Petitioners**
v.Ved Murti and others... *Respondents.**Criminal Procedure Code (V of 1898), sections 107, 112, 113 and 117—Interpretation—Petitioners brought to the Court under arrest and read over an order under section 112—Without inquiring into the truth of the information, Magistrate if could ask the petitioners to give an interim bond for good conduct.*

The petitioners were arrested and brought before the Magistrate. They were read over an order under section 112 of the Criminal Procedure Code. Having the petitioners before him and having read to them the order under section 112, it was the duty of the Magistrate either to release them unconditionally or to ask them to give an interim bond for good conduct but only after he has started inquiring into the truth of the information. The Magistrate could only ask for an interim bond if he could not complete the enquiry and 'during the completion of the enquiry' postulates a commencement of the enquiry, which means commencing of a trial according to the summons procedure. It was not given to him to postpone the case and yet ask the petitioners to furnish a bond for good conduct. Nothing of this kind was done. Therefore the proceedings for asking for an interim bond was completely illegal.

[*Paras. 17 and 20.*]

Petition under Article 32 of the Constitution of India.

Madhu Limaye (in person).

K Rajendra Chaudhury and Pratap Singh,
for Petitioner No. 2.*L. M. Singhvi, Senior Advocate (O. P. Rana, Advocate, with him),* for Respondents

The Order of the Court was made by

Hidayatullah, C. J.—Having heard the arguments in the case of Mr Madhu Limaye we are of opinion that his custody from 9th August, 1970, was illegal and he was therefore entitled to be released. As he is no longer in custody, no order for his release is necessary. As regards his arrest under section 151 of the Code of Criminal Procedure, we shall express our opinion in our judgment to be delivered after the decision of the constitutional questions raised by him. Our reasons for this order will also appear then

The same order is made in the case of Mr. Ram Adhar Giri who in co-petitioner with Mr. Madhu Limaye in this petition.

2. ORDER.—This is a combined petition by Madhu Limaye, M P, a leader of the Samyukta Socialist Party of India and Ram Adhar Giri, Secretary of the same party in the District of Varanasi. This petition was heard along with Writ Petition No. 77 of 1970, filed earlier by Madhu Limaye, because both these petitions challenge the constitutionality of section 144 and Chapter VIII of the Code of Criminal Procedure. By an Order* passed unanimously by a Special Bench of 7 Judges (of which we were also members) on that part of the arguments, the petitioners stand concluded on the constitutional points raised by them. The Special Bench holds that section 144 and the provisions of Chapter VIII of the Code of Criminal Procedure, when properly construed, are constitutional and valid. Applying the construction which is elaborately indicated in that Order we proceed to examine this petition.

3. The case of the petitioner is that on 3rd August, 1970, one of them (Madhu Limaye) arrived at Varanasi Airport from Calcutta and Ram Adhar Giri and others went there to receive him. The two petitioners named here and one Narendra Shastri were arrested by the police at a level-crossing when they were proceeding by car to the City. According to the petitioners they were not told the grounds of their arrest but were taken to Varanasi Police Station and afterwards to the City Magistrate's

* W.P. No 307 of 1970. 22nd September/
28th October, 1970.

* Reported in (1971) 2 S C.J. 479.

Court On the way the Police Officers showed them the report made by the Police to the Magistrate for taking action under sections 107/117 and 151 of the Criminal Procedure Code. When they appeared before the Magistrate he read out a notice under section 112 of the Code calling upon them to furnish security in the sum of Rs 5 000 with two sureties in the like amount for keeping the peace. Narendra Shastri was however discharged as it was not proved that he was the right person. The petitioners refused to accept the notice and the Magistrate thereupon adjourned the case to the following day and remanded them to Jail when the petitioners declined to offer bail.

4 On the following day (10th August, 1970) the case was again adjourned to 17th August, 1970. Since then the case has stood adjourned as the petition in this Court was pending and the petitioners were in the custody of this Court. As the remand was not extended by the Magistrate the petitioners became free from custody and we declared them to be so. After the arguments concluded we held by an Order that detention of the petitioners from 9th August 1970 was illegal and they were entitled to be free. Since they were not longer in detention we were not required to make an order, we now give our reasons for the Order we made.

5 The petitioners were arrested by the Police without a warrant under section 151, Criminal Procedure Code for purposes of taking them before a Magistrate to be bound over under section 107 of the Code of Criminal Procedure. The arrest of the petitioners being one for action under section 107 of the Code the provisions of Chapter VIII applied. The Special Bench has analysed those provisions critically and we need refer to them only briefly here. The first subsection of the section arms certain Magistrates of specified classes with the power to require a person who is likely to commit a breach of the peace or to disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity to execute a bond and furnish security for keeping the peace. The subsection however lays down that the Magistrate shall proceed "in the manner herein-

after provided." The Chapter then contains elaborate provisions for the procedure which the Magistrate must follow. Since the liberty of the person is involved, not because of anything he has done but because of the likelihood of breach of the peace or disturbance of the public tranquillity by reason of some act on his part the provisions must obviously be strictly followed. Since the action is taken on the mere opinion of the Magistrate the provisions of the Chapter naturally ensure that no case of harassment arises.

6 The first requirement is that the Magistrate must pass an order in writing setting forth the substance of the information received, the amount of bond to be executed the term for which is to be in force and the number character and class of sureties (if any) required under section 112. This order may be passed in the presence of the person to be bound over and even in his absence. This is clear from the provisions of the two sections that follow. Section 113 deals with the procedure when the person is present in the Court. Then the Magistrate must read over the Order to the person and if he so desires, the substance of it must be explained to him. When the person is not present in Court, the next section applies. The Magistrate shall then issue a summons to him to appear and if he is in custody the Magistrate shall issue a warrant to the person who has his custody to produce him before the Court. If there is need of immediate arrest of the person, the Magistrate on the report of the Police Officer or upon other information (the substance of which report or information is to be recorded in writing by the Magistrate) may issue a warrant for the arrest of the person. This action can only be taken if there is reason to fear that a breach of the peace cannot be prevented except by the arrest of the person (section 114). Whenever a summons or a warrant is issued under section 114 a copy of the Order made, under section 112 must be sent and delivered to the person (section 115). The Magistrate is empowered to dispense with the personal appearance of the person and allow him to appear by a pleader (section 116).

7 In all cases where the person is present in Court or is brought there by a warrant in the two cases mentioned or appears

on summons and the Order under section 112 is read over to him or sent to him with the warrant, the Magistrate obtains jurisdiction over the person. He is then required to proceed under section 117. This section is divided into several sub-sections but we are concerned only with the first three sub-sections. Under the first sub-section, the Magistrate shall proceed to enquire into the truth of the information upon which he has so far acted and take such further evidence as may appear necessary. Under the second section the enquiry is a trial and the procedure applicable to the trial and recording of evidence in summons cases is enjoined. Under the third sub-section, a power has been conferred on the Magistrate to ask for a bond with or without sureties to keep the peace and be of good behaviour pending the completion of the enquiry. This power is used if the Magistrate considers that immediate measures are necessary for prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety. He does so for reasons to be recorded in writing and if the person does not execute such bond, the Magistrate is empowered to detain him in custody till the bond is executed or the enquiry is concluded. The rest of the provisions of the section as also of the Chapter need not be mentioned, for the case never went beyond this stage when the petitioner became free by reason of the expiry of the remand Order.

8. The matter arose on two reports said to have been made to the Magistrate. The first was by one Brij Mohan, s/o. Shri Ulhas Mistry of Lahirtara. His report was made at 9.15 A. M. on 9th August, 1970. In this report, he has stated that members of the Samyukta Socialist Party and Samajvadi Yuvjan Sabha were indulging in violent activities and inflammatory speeches, that their leader Madhu Limaye and his companions were arriving in Varanasi and with their help the parties would indulge in further looting and destruction in Courts and other places as a result of which there was danger to the life and property of general public. This report was entered in the general diary of Police Station Cantonment in Varanasi. After the

report was entered it is noted Brij Mohan went away. The second report was made at 9.30 A. M. at the same Police Station by Sub-Inspector Ved Murti Bhatt. In this report also it is stated that the two parties above-mentioned were indulging in violent activities and had damaged and looted the Radio Station at Sarnath and the P T I Teleprinter. It is stated that after their leaders Madhu Limaye, Ram Adhar Giri, Narendra Shastri and their companions reached Varanasi there would be destructive activities and looting in the Courts and other places in the City and grabbing of the lands of others. There was therefore apprehension of violent, destructive activities. There was a fear in the general public and an imminent danger of breach of the peace.

9. Between these two reports came the arrest by the police under section 151 of Criminal Procedure Code, without a warrant from the Magistrate. In fact no proceedings under section 107 were drawn up before the arrest of the petitioners. They were arrested first and then taken to the Court by the police with a view to being bound over. When the petitioners arrived in Court, the Magistrate drew up the Order under section 112 and read it over to the petitioners. They were asked to sign the Order which they refused to do and Madhu Limaye and Ram Adhar Giri made a complaint. They were not statements on the merits of the case but a minute of what had happened to them after their arrival at Varanasi. The notice under section 112 which was given to them stated briefly that a report was received from the Police Station Cantonment, Varanasi that the two petitioners were acting in such a manner "which gives an impression that there is an apprehension of danger to the life and property of general public causing damage to public property and to occupy it unlawfully also". That there was "an apprehension to breach of the peace on account of their activities" and that there were sufficient grounds to take action. After the above notice was read over and was refused to be signed by the petitioners, the Magistrate passed an Order adjourning the case to which we shall refer presently.

10. Before the action was taken, a report was made to the Magistrate by Shiv

Narain Saxena, in charge of the Police Station Cantonment in which it was stated as follows

' Sir,

It is requested that there was immediate apprehensions of breach of peace from the aforesaid persons Therefore arrest was made under section 151, Criminal Procedure Code There is a likelihood of breach of peace by them in future Therefore it is requested that in order to maintain peace they should be bound down under section 107/117 Criminal Procedure Code on furnishing suitable bail and muchalkas

(Sd) Shiv Narain Saxena

S O

9 8 70 '

11 Under this report were names of six witnesses including Brij Mohan and five Police officers

12 The Magistrate recorded a short Order after the Public Prosecutor moved him by a request in writing for action under section 107 of the Code of Criminal Procedure The Order was as follows

'I have seen the police report dated 9th August 1970 and I am satisfied that there is an apprehension of breach of peace and public tranquillity from the side of O Ps Nos 1 and 2 who are active members of S S P, engaged in land grab movement and wrongful acts to public property and in my opinion there are sufficient grounds for proceeding under section 107, Criminal Procedure Code, for the prevention of breach of peace and public tranquillity A notice under section 112 Criminal Procedure Code has been read over to O Ps Nos 1 and 2 today calling upon them to show cause why they should not be ordered to execute a personal bond of Rs 5 000 with two reliable sureties each of like amount for keeping peace for a period of one year As regards O P No 3, the S O Cantt could not satisfy the Court when questioned orally as to who he was and what was his address In my opinion there is no necessity of taking any evidence on this point later on In view of this I am not satisfied that there is an apprehension of breach of peace and public

tranquillity from O P No 3 Accordingly I discharge him Fix on 10th August, 1970, for statement of O Ps Nos 1 and 2

(Sd) Mohinder Singh,

City Magistrate

Magistrate 1st Class Varanasi,
9th August, 1970 '

13 It will be noticed that before the Magistrate took action to call for an interim bond he did not make any efforts to enquire into the truth of the information as is required by section 117 (3) of the Code He only saw the Police report and was satisfied from it, without even questioning the Sub Inspector He did question him with regard to Narender Shastri who is described in the Order as O P No 3 but not others It is also to be noticed that the case was fixed on the following day for statements of Madhu Limaye and Ram Adhar Giri and there is no mention that any witnesses were to be present In fact even on the next day the Magistrate was not going to try the case but only take statements from the petitioners On the following day there was a report by the Sub-Inspector which reads as follows

'It is requested that Shri Madhu Limaye, M P, was sent to Jail on 9th August, 1970 under sections 151, 107/117, Criminal Procedure Code, and his case is to come up for hearing in your Honourable Court today, the 10th August 1970 The programme of causing destruction and land grabbing is being carried out by the Samyukta Socialist Party in the City of Varanasi and its rural areas Force has been deployed on duty On account of the hearing of the case of Shri Madhu Limaye M P in the Court there is a likelihood of hindrance in the administrative arrangement

There is a great expectation of disturbance of peace In these circumstances it is requested that the Court proceedings may be held in Jail so that situation may remain under control Report is submitted

(Sd) Shiv Narain Saxena
In-charge Police Station Cantt ,
Varanasi
10th August, 1970 "

14. The Magistrate ordered on this "Kept on File."

That day the Magistrate passed the following Order :

"Let the case be registered. I have seen the Police report dated 10th August, 1970, regarding holding of proceedings against O. Ps Nos. 1 and 2 in District Jail instead of the Court. In the interest of peace and public tranquillity these proceedings will be taken in the District Jail itself. As I am too busy with the law and order duty in the city, it will not be possible to take up the proceedings in District Jail today. Let it be fixed in the District Jail on 17th August, 1970. O Ps. were informed in Jail.

(Sd). Mohinder Singh.

10th August, 1970."

15. Again there was no order to keep the witnesses ready on the 17th.

16. It appears therefore that the Magistrate used the powers under section 117 (3) without commencing to enquire into the truth of the information. No sworn statement of any kind was obtained by him and he adjourned the cases for the examination of the petitioners without summoning the witnesses in support of the information. He however, asked the petitioners to furnish an interim bond or go to Jail.

17. It appears to us that the powers of the Magistrate to ask for an interim bond were not properly exercised in this case and consequently the order to the petitioners to furnish interim bond could not be made. That stage had not been reached under the scheme of the Code of Criminal Procedure. The Magistrate could only ask for an interim bond if he could not complete the enquiry and 'during the completion of the enquiry' postulates a commencement of the enquiry, which means commencing of a trial according to the summons procedure. It was not given to the Magistrate to postpone the case and hear no body and yet ask the petitioners to furnish a bond for good conduct. The Magistrate should have made at least some effort to get a statement from Brij Mohan or Ved Murti Bhatt or any of the witnesses named in

the challan. Nothing of this kind was done. Therefore the proceedings for asking for an interim bond were completely illegal.

18. Learned Counsel for the State attempted to put the matter under various sections of the Code of Criminal Procedure. He relied on section 344 or in the alternative on section 91 or in the alternative again on section 167

19. He was groping for some support from another part of the Code. Those sections have been dealt with by the Special Bench and held inapplicable to the facts of a trial under Chapter VIII which contains its own elaborate procedure for trial of a suspected person. It is not possible to overlook those provisions, which the Legislature has with great emphasis specified for the trial of such cases. In fact section 91 applies to a person who is present in Court and is free because it speaks of his being bound over, to appear on another day before the Court. That shows that the person must be a free agent whether to appear or not. If the person is already under arrest and in custody as were the petitioners, their appearance depended not on their own violation, but on the violation of the person who had their custody. This section was therefore inappropriate and the rulings cited in support of the case were wrongly decided as was held by the Special Bench. Similarly section 344 deals with the adjournment of a case. It is not a substitute for section 117 (3). Section 117 (3) presumes that unless the person is bound over, he would be able to perpetrate that act, which causes an apprehension of the breach of peace. It is not necessary to take a bond from a person who is already in detention and is not released. The danger arises when the man is free and not when he is in custody. It is to prevent his acting that the bond is taken or he is kept in custody till he gives the bond. Section 344 deals with ordinary adjournment of a case and allows a person to be admitted to bail or the Court to remand him if he is in custody. This is not the case here. The petitioners were brought under the process of Chapter VIII. They were read over an Order under section 112 and if interim bonds were required from them the Magistrate ought to have entered upon the

enquiry and satisfied himself at least *prima facie* about the truth of the information in relation to the alleged facts. Without making any enquiry, neither could the Magistrate order the petitioners to be detained in custody nor require them to execute a bond with or without surety.

20 It is quite clear that the Magistrate was too much in hurry. He did not read the law to inform himself about what he was to do. Having the petitioners before him and having read to them the order under section 112, it was his duty either to release them unconditionally or to ask them to give an interim bond for good conduct but only after he has started inquiring into the truth of the information. It was for this reason that we held that the Magistrate did not act according to the law and his action after 9th August 1970 in detaining the petitioners in custody was illegal. As the petitioners had already become free by reason of the remand having expired, we declared them to be free.

V M K

Petitioners released

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — *J C Shah and K S Hegde, JJ*
Naresh Chandra Saha

*Appellant**

v

Union Territory of Tripura
and others

Respondents

(A) *Constitution of India (1950) Article 226—Laches—Writ petition challenging order of reversion made nearly 7 years before the filing of the petition—Petition is belated* [Para 3]

(B) *Constitution of India (1950), Article 311—Suspension and dismissal of a civil servant holding an officiating post—Rein statement ordered by Court—Accordingly, civil servant concerned reinstated but reverted to his substantive post with retrospective effect—Validity*

Where a civil servant who was holding an officiating post and who was suspended

and dismissed from service was reinstated in accordance with the directions of the Court in a writ petition but was reverted to his substantive post with retrospective effect from the date on which the officiating post which he was holding was filled by another officer approved by the U P S C

Held, the civil servant cannot contend that he must be restored to the same office which he was holding at the date of termination of employment. If he had not been suspended and dismissed, Government could have reverted him to his substantive post on the filling up of the officiating post. [Para 6]

Appeal by Special Leave from the Judgment and Order, dated the 8th November 1965 of the Judicial Commissioner's Court, Tripura in Writ Petition No 27 of 1961

M K Ramamurthi Senior Advocate, (*Mrs Shyamla Pappu*, Advocate with him) for Appellant

Dr V A Seyid Muhammad Senior Advocate (*S P Nayar* and *B D Sharma* Advocates, with him), for Respondents

The Judgment of the Court was delivered by

Shah J—The appellant joined the Tripura Civil Service on 30th October, 1949, and was posted as a probationer Divisional Purchasing Officer, Dharmnagar. In 1953, the Tripura Civil Service was split into two cadres—senior officers being absorbed as Sub-Divisional Officers and junior officers as Sub-Treasury Officers. The appellant was absorbed as Sub-Treasury Officer with effect from 1st April, 1950. On 10th May 1954, the appellant was appointed officiating Sub-Divisional Officer with effect from 10th September 1953. By order, dated 12th May, 1954, the appellant was reverted to the post of Sub-Treasury Officer with effect from 6th May, 1954. The appellant made several representations to the Chief Commissioner but without success. The appellant was suspended by order, dated 6th May 1957, for failure to obey the orders of the Additional District Magistrate and he was dismissed with effect from 3rd July 1958, by the order of the Chief Commissioner.

2 The appellant moved a petition in the Court of the Judicial Commissioner

* C.A. No. 2203 of 1966 6th October 1969

at Tripura challenging the orders of suspension and dismissal. On 19th February, 1960, the Court set aside the impugned orders. By order dated 7th November, 1960 the Chief Commissioner reinstated the appellant to the post of Superintendent of Surveys and by the same order reverted him to his substantive post of Sub-Treasury Officer with retrospective effect from 7th June, 1957. The appeal of the appellant to the President having been rejected, he moved a petition in the Court of the Judicial Commissioner for a writ quashing the orders dated 12th May, 1954, and 7th November, 1960. The appellant contended that an order of reversion cannot be made to have retrospective operation.

3. The petition insofar as it relates to the first order was belated. Again there is no ground for holding that retrospective operation was in fact given to that order of reversion. By the order dated 12th May, 1954, the appellant was reverted to the post of Sub-Treasury Officer, but the order did not state the date from which the order was to be effective. In summarising the averments made in the petition, the Judicial Commissioner stated that the petitioner had alleged that the order dated 12th May, 1954, was to have effect from 6th May, 1954. A copy of that petition is not filed in this Court and we are unable to accept, especially having regard to the terms of the order, that any retrospective operation was sought to be given. In any event the Judicial Commissioner was justified in refusing to entertain any contention as to the validity of the order of reversion made nearly seven years before the date on which the petition was filed.

4. The second order dated 7th November, 1960, passed by the Chief Commissioner consists of two parts—(i) that the appellant be reinstated in the post of the Superintendent of Surveys with effect from the afternoon of 7th May, 1957; and (ii) that the appellant be reverted to the substantive post of Sub-Treasury Officer with retrospective effect from 7th June, 1957. The appellant, as already stated, was suspended on 6th May, 1957. The order of suspension and the order of dismissal which followed it were set aside by the Judicial Commissioner, and the Chief Commissioner, therefore rein-

stated the appellant with effect from the afternoon of 7th May, 1957 to the post occupied by the appellant on the date on which he was suspended. But the appellant was not holding the post of Superintendent of Surveys substantively, he was merely officiating in that post. He was therefore reverted with effect from 7th June, 1957, to his substantive post. The order was passed because the post was filled by another officer approved by the U P S C.

5. Counsel for the appellant relied upon the observations made by S. R. Das, C J in *Parshotam Lal Dhimra v. Union of India*¹.

“But the mere fact that the servant has no title to the post or the rank and the Government has, by contract, express or implied, or under the rules, the right to reduce him to a lower post does not mean that an order of reduction of a servant to a lower post or rank cannot in any circumstances be a punishment. The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. Thus if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstances may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty.”

These observations, in our judgment, do not assist the appellant. The order reverting the appellant from 7th June, 1957, to his substantive post does not entitle him to forfeiture of his pay or allowances or loss of seniority in his substantive rank or stoppage or postponement of his future chances of promotion.

6. Counsel for the appellant urged that whenever a person is reinstated as from the date on which his services were terminated he must be restored to the same

1. (1958) S.C.J. 217 : (1958) S.C.R. 828, 86

office which he was holding at the date of the termination of employment or suspension and must receive salary up to the date of reinstatement which that office carried. We find no warrant for the submission. If the appellant had not been suspended, it was open to the Chief Commissioner still to revert him to his substantive post. We see no reason for holding that the Chief Commissioner could not do so when he reinstated the appellant. There is no ground for thinking that the order was made maliciously. The reason for reversion was that since 7th June, 1957 another officer was occupying the post of the Superintendent of Surveys. The post having been already filled, the appellant cannot claim that when he was reinstated he should have been paid emoluments attached to the office of Sub Divisional Officer on the footing that he continued to occupy that office which he was holding in an officiating capacity.

7 The appeal therefore fails and is dismissed. Having regard to the circumstances of the case there will be no order as to costs.

V K ——— Appeal dismissed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — J C Shah and A N Grover JJ

Union of India Appellant*

v

West Coast Paper Mills Ltd. Respondent

(A) *Railways Act (IX of 1890), sections 41 (1) 29 and 42—Jurisdiction conferred on Railway Rates Tribunal under section 41—Scope*

The jurisdiction conferred upon the Railway Rates Tribunal by section 41 and relating to matters set out in clauses (a) to (c) thereof is restricted by the terms of section 29 (3) and section 42. Section 28 prohibits a railway administration from making undue preference or subjecting any particular person or railway ad-

ministration or any particular description of traffic to any undue or unreasonable prejudice or disadvantage. But even in a dispute relating to the matters set out in section 41 (1) (a) (b) and (c) where the Central Government has fixed by general or special order maximum and minimum range of rates for the whole or any part of a railway the complaint that the railway administration has contravened any order issued by the Central Government may be determined by the Central Government and not by the Tribunal. Similarly the Central Government has and the Tribunal has not the power to classify or reclassify any commodity and to increase or reduce the level of class rates and other charges. Subject to these restrictions the Tribunal has the power to determine whether the Railway Administration has acted in contravention of the provisions of section 28 i.e. it has granted any undue or unreasonable preference or advantage to or in favour of any particular person, or shown any undue or unreasonable prejudice or disadvantage to any person or railway administration or any particular description of traffic and was charging for the carriage of any commodity between two stations a rate which was unreasonable or was levying any other charge which was unreasonable.

[Para 10]

There is nothing in the rules framed by the Railway Board which even indirectly affects the jurisdiction of the Tribunal to determine whether the rates for carriage of certain specified commodities between two stations are unreasonable. In the present case the Tribunal has merely declared that the chargeable rate of freight determined by multiplying by three the distance over which the goods are transported for specific commodities is in contravention of section 28. This relief granted by the Tribunal is within its jurisdiction. It is not necessary to decide whether the Tribunal has power to fix rates in substitution of rates declared unreasonable in exercise of the jurisdiction under section 41 (1) (b), because no such rates are fixed by the Tribunal.

[Paras 12 13 and 14]

(B) *Constitution of India (1950) Article 136—Finding by Railway Rates Tribunal*

that charge levied by railway administration is unreasonable and discriminatory—Finding cannot be challenged in appeal under Article 136. [Para. 11.]

Appeal by Special Leave from the Judgment and Order dated the 18th April, 1966 of the Railway Rates Tribunal at Madras in Complaint No. 4 of 1963.

Jagadish Swarup, Solicitor-General of India, (A. S. Nambiar and S. P. Nayar, Advocates, with him), for Appellant.

H. R. Gokhale and M. K. Ramamurthi, Senior Advocates (Mrs. Shyamla Pappu and B. D. Sharma, Advocates, with them), for Respondents.

The Judgment of the Court was delivered by

Shah, J.—This is an appeal with Special Leave against the order of Railway Rates Tribunal constituted under section 34 of the Indian Railways Act IX of 1890.

2. The West Coast Paper Mills Ltd.—hereinafter called ‘the Company’—is a manufacturer of paper and paper products. It has set up a factory at Bengurnagar in Dandeli at the terminus of Alnawar—Dandeli branch line of the Southern Railway. This branch line 32 kilometre in length was a “light railway” constructed and opened for traffic by the Government of Bombay in 1919, principally for the purpose of transporting forest produce collected in the surrounding region. With the reorganisation of the States under the States Reorganisation Act the ownership of the Railway passed to the Mysore Government. The Railway was finally taken over by the Government of India with effect from 1st October, 1962, and now forms part of the Indian Railways.

3. The Company used the branch line for transporting coal, limestone etc, required for its manufacturing activities and also for transporting its manufactured products. Initially the Railways were levying freight over this branch line at “common rates” for all commodities on “weight basis”. On representations made by the users of its branch line, the Indian Railways substituted, with effect from 1st February, 1964, the standard telescopic class rates.” In charging the goods freight, however the actual distance of the branch line was multiplied by three.

4. The Company filed a complaint before the Railway Rates Tribunal and challenged as “unjust, unreasonable and discriminatory” the method of levy of freight on goods traffic. The Company claimed that the levy of rates offended the provisions of section 28 of the Indian Railways Act, 1890, and that the existing rates were *per se* unreasonable. The Company claimed a declaration that the rate between the stations specified in the complaint were unreasonable and a direction to the Railway to levy with effect from the date of the complaint standard rates and charges for the traffic on the branch line without “inflating the distance”

5. The Union of India as representing the Southern Railway defended the complaint. They contended that the introduction of “standard rates and fares” over the section “on a continuous distance basis with three times inflation of the chargeable distance” for goods was made on the authority of the Central Government under its directive and the Railway Rates Tribunal is precluded from questioning its legality or propriety. They also contended that in any event the levy is not unjust, unreasonable or discriminatory, that the increased rate on the basis of “inflated distance” was in vogue in different sections of the Indian Railways—; that such inflation was adopted either because of the higher cost of operation of the particular section or because of unusually heavy capital costs involved on a particular system of Railway and for similar reasons; that the “reason for inflation on the branch line was due to large capital investment for the rehabilitation of this branch line by the Central Government after it was taken over from the previous owners; that before the branch line was purchased it was working at a loss for a number of years and for effectively working the branch line it had become necessary to undertake extensive repairs and renewal work including complete relaying of the track, construction of crossing stations etc ; that the total costs of such repairs and renewal was Rs 28.99 lakhs, and that even after the introduction of higher rates and fares with “three times inflation” in distance, the users of branch line will be paying less than what they were paying before the introduction of the

new rates. The Union denied the charge of discrimination and undue preference and contended that the Tribunal had no jurisdiction to hear the complaint merely because the Company had selected certain commodities and certain sets of stations in support of its grievance under section 41 (1) (b) of the Indian Railways Act, 1890.

6 On the pleadings before the Tribunal, six issues were settled four of which are material

(1) Is the complaint not maintainable against the respondent (Union of India) under section 41 (1) (b) of the Indian Railways Act 1890 (IX of 1890)?

(2) Whether rates for the carriage of complainant's traffic have become unreasonable as a result of inflating the chargeable distance over the Alnawar Dandeli Section?

(3) Whether the impugned method of charging on inflated distance (at three times the actual distance over the Alnawar Dandeli Section to arrive at the distance for charge) is governed by any order of the Central Government and if so whether the complaint is not maintainable for the same reason?

(4) Whether the respondent (Union of India) in charging the complainant's traffic over the Alnawar Dandeli Section at tariff rate on continuous distance basis but with three times the inflation in the chargeable distance over the section is subjecting the complainant's traffic to the undue prejudice in contravention of section 28 of the Indian Railways Act?

The Tribunal decided the case against the Railway Administration. In the view of the Chairman and Mr Munshi (one of the members of the Tribunal) on Issue No (1) the complaint was maintainable against the Union of India under section 41 (1) (b) of the Indian Railways Act. They observed that though a class rate between two stations for a commodity would fall outside the scope of section 41 (1) (b) it was still open to the Company to make a grievance in respect of the selected few items for the purpose of attack. On Issue No (2) they held that the Railway had not made out any justification for inflating

the chargeable distance over the Alnawar Dandeli Section. On Issue No (3) they held that the jurisdiction of the Tribunal to examine the validity of the impugned method of charging the distance by a multiple of three of the actual distance over the section to arrive at the distance for determining freight, though governed by the order of the Central Government was not excluded. On Issue No (4) the Chairman observed

'There is no doubt that the order in question (Exhibit rule 4) is one issued under section 29 (1) of the Act. If the Tribunal were to give any relief which might have even indirectly the effect of cancelling the said order it would amount to changing the maxima and minima rates and the level of class rates applicable to Alnawar Dandeli Section which would not be within its power or jurisdiction. However, if it declared only certain rates for specific commodities between specific pairs of stations to be unreasonable and fixed new rates in lieu thereof the level of class rates as such would not be affected. If such rates are based on the actual distance they would also fall within the maxima and minima under the inflated distance sanctioned by Exhibit rule 4. I therefore, find that though the method of charging on inflated distance over the Alnawar Dandeli Section is governed by the order of the Central Government (Exhibit R-4) this Tribunal does not lose jurisdiction to decide on the unreasonableness of rates arrived thereby and the complaint cannot be said to be not maintainable for that reason.'

Mr Munshi agreed with that view. In his view charging the Company's traffic over the branch line at tariff rates on continuous distance basis but at three times the chargeable distance over the branch line was 'unwarranted, unjustified and therefore unreasonable'.

7 Mr V K Rangaswami, the third member of the Tribunal, agreed with the Chairman and Mr Munshi on the issue of unreasonableness of the rate charged by multiplying the distance by three. He also agreed that the jurisdiction of the Tribunal to entertain a complaint relating to levy of unreasonable charges between

specific stations was not excluded. But he differed with the other members on the competence of the Tribunal to declare invalid the method of levy of freight and to fix new rates in lieu of rates declared unreasonable. In the opinion of the majority it was competent to the Tribunal to do so. Mr. Rangaswami held that it was for the Railway Administration to consider the matter and to take action to cancel the inflated distance over the branch line generally, and to fix new rates.

8. The Tribunal by a unanimous order made the following directions :

“.....that the class rate with inflated distance applicable to the Alnawar-Dandeli Branch, subjects the complainant to an undue disadvantage in contravention of section 28 of the Indian Railways Act and also render unreasonable *per se* the rates for the complainant's traffic to and from Dandeli.”

Against that order, this appeal has been filed with Special Leave.

9. The relevant provisions of the Indian Railways Act IX of 1890 may be briefly set out :

Section 28.—“A railway administration shall not make or give any undue or unreasonable preference or advantage to, or in favour of any particular person or railway administration, or any particular description of traffic, in any respect whatsoever, or subject any particular person or railway administration or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.”

Section 29.—“(1) The Central Government may by general or special order fix maximum and minimum rates for the whole or any part of a railway, and prescribe the conditions in which such rates will apply.

(2) * * *

(3) Any complaint that a railway administration is contravening any order issued by the Central Government under sub-section (1) shall be determined by the Central Government.”

Section 41.—“(1) Any complaint that railway administration—

(a) is contravening the provisions of section 28, or

(b) is charging for the carriage of any commodity between two stations a rate which is unreasonable, or

(c) * * *

may be made to the Tribunal, and the Tribunal shall hear and decide any such complaint in accordance with the provisions of this Chapter.”

Section 42.—“The Central Government alone shall have power—

(a) to classify or reclassify any commodity ;

(b) to increase or reduce the level of class rates and other charges.”

10. The jurisdiction conferred upon the Tribunal by section 41 and relating to matters set out in clauses (a) to (c) thereof is restricted by the terms of section 29 (3) and section 42. Section 28 prohibits a railway administration from making undue preference or subjecting any particular person or railway administration or any particular description of traffic to any undue or unreasonable prejudice or disadvantage. But even in a dispute relating to the matters set out in section 41 (1) (a), (b) and (c), where the Central Government has fixed by general or special order maximum and minimum range of rates for the whole or any part of a railway the complaint that the railway administration has contravened any order issued by the Central Government may be determined by the Central Government and not by the Tribunal. Similarly, the Central Government has and the Tribunal has not the power to classify or reclassify any commodity and to increase or reduce the level of class rates and other charges. Subject to these restrictions, the Tribunal has the power to determine whether the Railway Administration has acted in contravention of the provisions of section 28 *i.e.*, it has granted any undue or unreasonable preference or advantage to, or in favour of any particular person, or shown any undue or unreasonable prejudice or disadvantage to any person or railway administration or any particular description of traffic, and was charging for the carriage of any commodity between two

stations a rate which was unreasonable or was levying any other charge which was unreasonable

11 In the present case the maximum and minimum range of rates have been fixed by the Central Government. A complaint that the railway administration has acted in contravention of the order issued by the Central Government may be determined by the Central Government and not by the Tribunal. Again the Central Government alone has the power to classify or reclassify any commodity or to increase or reduce the level of class rates and other charges. The Tribunal accepted these limitations upon the exercise of its powers. The Tribunal however found that the charge made by the railway administration under the order of the railway Board levying tariff at the standard rates but on the footing that for each *kilometer* the goods are transported the charge will be levied at three times the standard rate is unreasonable and discriminatory. The finding proceeds upon appreciation of evidence which has been examined in great detail. The finding of the Tribunal cannot be challenged in this appeal with Special Leave under Article 136 of the Constitution and no attempt has been made to challenge before us that finding.

12 On behalf of the Union it was urged by the Solicitor General that the impugned rates were station to-station rates and relying upon certain rules framed by the Railway Board, Counsel contended that in respect of station to-station rates the Tribunal had no jurisdiction to give relief. Rule 63 of Goods Tariff No 28 in force from 1st August 1950 provided for the station to station rates as one of the types of rates chargeable. Clause (7) provided that a "station to station rate" is a special rate for the total distance between two specific points (stations only) and clause (8) provided that

Station to-station rates are as follows—

(i) those between two stations on the same Railway that is local station to-station rates,

(ii) those between a station on one railway and a station on another railway.

Similarly in Rule 67 of Goods Tariff No 29 in force from 1st June 1954, similar definition of station to station rates was given. In Rule 67 of Goods Tariff No 29 effective from 1st October, 1958, rates were divided into two types—(i) Class rates and (ii) station to-station rates. By clause (3) it was provided

"(i) 'Station to-station rate' means a special reduced rate applicable to a specific Commodity booked from one specified station to another specified station

(ii) Station to-station rates may be quoted from and to stations on the same railway or from a station on one railway to a station on another railway'

These rules have in our judgment, no relevance in determining the matter in dispute in this appeal, for in section 41 (1) (b) the expression used is not "station to-station rates", but a rate between two stations which is unreasonable. There is nothing in the rules which even indirectly affects the jurisdiction of the Tribunal to determine whether the rates for carriage of certain specified commodities between two stations are unreasonable. The Tribunal has expressly observed that the relief granted to the Company must be within the range of rates prescribed by the Central Government. The Tribunal has expressly observed that it is incompetent to grant relief which might even indirectly cancel the order of the Central Government under section 19 (1), for, it would amount to changing the range and level of class rates applicable to the branch line. But if the Tribunal declared that only certain rates for specific commodities, between specified pairs of stations are unreasonable, the level of class rates is not affected. The Tribunal is invested with the authority subject to the limitations contained in section 29 (3) and section 42 to entertain a complaint and to give relief in respect of rates which are found to be unreasonable between two stations. The complaint made by the Company did not seek intervention of the Tribunal in matters which may be raised only for decision to the Central Government by section 29 and section 42 of the Act and the Tribunal has not given any relief in contravention of those provisions. The Tribunal has merely declared that the chargeable rate of freight determined by multiplying by

three the distance over which the goods are transported for specific commodities is in contravention of section 28 of the Indian Railways Act, 1890.

13. We do not see force in the opinion expressed by Mr. V. K. Rangaswami and even if the Tribunal holds that the rates between two stations in respect of a specific commodity are unreasonable, it cannot make a declaration to that effect. Such a view would deprive the Tribunal of its power to give formal shape to its view. We are not called upon to decide whether the Tribunal has power to fix rates in substitution of rates declared unreasonable in exercise of the jurisdiction under section 41 (1) (b) because no such rates are fixed by order of the Tribunal

14. The relief granted by the Tribunal is, in our judgment, within its jurisdiction.

15. The appeal fails, and is dismissed with costs.

V.K. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT :—J. G. Shah, G. K. Mitter, K S. Hegde, A. N. Grover and A. N. Ray, JJ.

Kakinada Annadana Samajam etc.
... *Appellants**

v.

The Commissioner of Hindu Religious and Charitable Endowments, Hyderabad and others etc. ... *Respondents.*

I. V. Gopalarao *Intervener.*

(A) *Constitution of India* (1950), Article 19 (1) (f) and section 31, *Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act* (XVII of 1966), section 2 (15)—*Office of Hereditary Trusteeship—Whether property within meaning of Article 19 (1) (f) or Article 31.*

The hereditary trustees of the institutions have only claimed a bare right to manage

and administer the secular estate of the institution or the endowment and in no case any hereditary trustee has claimed proprietary or beneficial interest either in the corpus or in the usufruct of the estate. The position of a hereditary trustee does not appear to be in any way different from that of a *dharmakartha* or a manager or custodian of an institution or endowment. There is one exception only. The hereditary trustee succeeds to the office as of right and in accordance with the rule governing succession. But in all other respects his duties and obligations are the same as that of a *dharmakarta*. A hereditary trustee cannot be equated to a *shebait* of religious institution or a *Mathadhipathi* or the *Mahant*. The ingredients of both office and property of duties and personal interest are blended together in the rights of a *Mahant* as also a *shebait* and a *Mathadhipathi*. The position of *dharmakartha*, on the other hand is not that of a *shebait* of a religious institution or of the head of a math. These functionaries have a much higher right with larger power of disposal and administration and they have a personal interest of beneficial character. A bare right to manage an institution or an endowment cannot be treated as property within Article 19 (1) and Article 31. The office of hereditary trusteeship is not property within Article 19 (1) (f) or any other Article of the Constitution.

[Paras. 10 to 12 and 7.]

(1964) 1 S.C.R. 561 and (1964) 7 S.C.R. 32 foll. A.I.R. 1954 Mad 385 : I L.R. 1955 Mad. 356, overruled. Observations to the contrary in (1970) 2 S.C.R. 424, held *obiter*.

(B) *Andhra Pradesh Charitable and Hindu Religious Endowments Act* (XVII of 1966), section 2 (15) and section 15—*Constitution of India* (1950), Article 19 (5)—*Hereditary Trustee—Restrictions imposed—Whether Protected by Article 19 (5), Constitution of India*

Even assuming that the rights in question constitutes "Property" their regulation by the relevant provisions of the Act is

* C As Nos 1249 to 1251, 1271, 1358, 1360, 1381, 1382, 1521, 1522, 1544, 1612, 1668, 1669, 1879, 1880, 1912, 1973 and 1974 of 1970.
2nd December, 1970.

protected by Article 19 (5) as the restrictions imposed on the hereditary trustees are reasonable and are in the interest of the general public [Paras 13 and 14]

Appeals from the Judgment and Order, dated the 31st December 1969 of the Andhra Pradesh High Court in Writ Petitions Nos 2871 of 1968 etc etc

M Natesan Senior Advocate (*A Subba Rao* Advocate with him), for Appellants (In C.As Nos 1249 to 1251, 1360 1382, 1521 and 1522 of 1970)

A Subba Rao Advocate for Appellants (In C.As Nos 1381 1544 1879 1880 1912, 1973 and 1974 of 1970)

Mrs Shyamla Pappu, Bala parameshwari Rao and *Vineet Kumar* Advocates, for Appellant (In C.A No 1271 of 1970)

M Natesan Senior Advocate, (*A V V Nair* Advocate with him), for Appellant (In C.A No 1358 of 1970)

K Jayaram Advocate for Appellant (In C.A No 1663 of 1970)

M Natesan Senior Advocate (*K Jayaram* Advocate with him) for Appellant (In C.A No 1669 of 1970)

A V Rangam Advocate for Appellant (In C.A No 1612 of 1970)

A K Sen Senior Advocate *R Venugopala Reddy* and *P Parameswara Rao* Advocates with him) for Respondents Nos 1 to 4 (In C.A No 1522 of 1970) Respondents Nos 1 and 2 (In C.A No 1669 of 1970) and Respondents in other Appeals

P Basu Reddy, Senior Advocate (*G Narayana Rao* Advocate with him), for Respondent No 6 (In C.A No 1669 of 1970)

K Rajendra Chowdhary Advocate, for Intervener

The Judgment of the Court was delivered by

Grover J—These appeals by certificate are from a common judgment of the Andhra Pradesh High Court and involve

the question of the constitutionality of certain provisions of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act 1966 (XVII of 1966) hereinafter called the 'Act'

2 A number of petitions under Article 226 of the Constitution were filed before the High Court on behalf of the institutions or endowments some of which were public and some private in character. A few institutions were societies registered under the Societies Registration Act while others claimed to be religious endowments or public bodies like municipalities which were managing the institutions. We might, for the sake of convenience state the facts in Civil Appeal No 1360 of 1970. In the affidavit of Nalam Rama Lingaiah it is stated that he is the hereditary trustee of the Nalam Choultry and Vysya Seva Sadanam which are private trusts. They were founded by his ancestor in the year 1879 and 1920 respectively. He had been the managing trustee from 1943. The Choultry was endowed with immovable property comprising an area of 453 acres of land which by careful management was now fetching an income of Rs 40 000. Besides feeding the poor and affording free lodging facilities to pilgrims scholarships were being given to deserving students. The Sevasadanam was endowed with huge properties which were fetching Rs 18,000 as income. The objects of this charity were (1) to impart education and training in handicraft to women (2) to feed poor girls, (3) to provide free shelter to women students and (4) run women's Sanskrit School. At no time there had been any complaint about mismanagement of the aforesaid trust. A number of other Choultrys were also mentioned which were being managed by the hereditary trustee or trustees. Some of them were providing food and shelter to students and travellers of all castes and creeds including Muslims and Christians. Among the objects of some of the Choultrys was included the performing of pujas in temples. These Choultrys were founded in the last century and ever since their inception the members of the family of the founder or founders had been managing them. At no time there had been any complaint of any kind against the management. On the contrary the hereditary trustees had improved the endowment properties and

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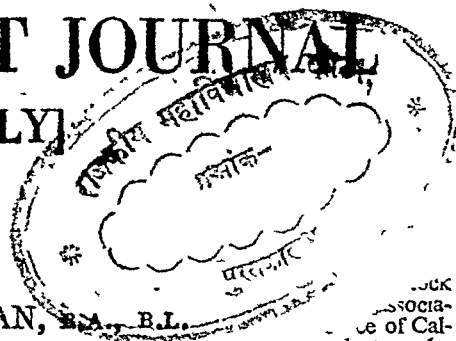
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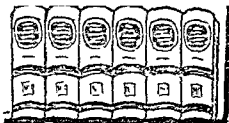
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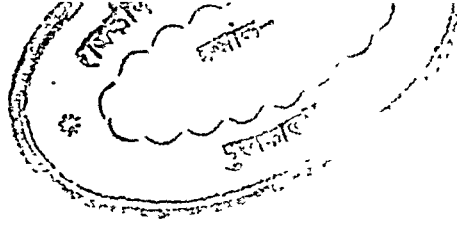


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RETIREMENT OF SRI K. SANKARANARAYANAN, EDITOR.

After serving for nearly twenty years as Editor, Sri K. Sankaranarayanan is retiring from active service for reasons of health. Cataract, an affliction of age, spares few people, and possibly, in the case of Sri Sankaranarayanan, it was hastened by going over closely printed type matter.

Quiet, unassuming, and even non-interfering, Sri K. Sankaranarayanan hardly ever threw his weight about. He concerned himself only with his work, at which he was systematic and competent. He sought no limelight, nor the publicity which an Editorship of a premier Law Journal could have brought him.

After taking the Law degree, he joined the office of Sri S. Doraiswami Iyer, a leading lawyer of those times, and was one of his senior-juniors till Sri Doraiswami Iyer, giving up a lucrative practice, retired from the profession. While he was working in the office of Sri S. Doraiswami Iyer, he served as a Reporter of the Madras Law Journal for a number of years. He revised some of the Local Acts published by the M.L.J. Office.

In July, 1952, he took over the Editorship on the passing away of Sri V. Subramania Iyer, and since then, has been editing the Madras Law Journal as well as the Supreme Court Journal and Madras Law Journal (Criminal). He maintained, during his editorship, the high tradition the Journals had set up.

Though his vision is partially restored, editing and reading of proofs would be too much of a strain and he seeks rest and relaxation.

Our relationship had been most cordial and his service to the Journal has been abiding.

We take this opportunity to wish him many happy years of restful and relaxed life.

Publisher.

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ERROR in PERSONAM

[With special reference to Mistake *Interpresentes* ; Legislative intervention
A Desideratum]

By

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"There is no branch of the law of contract" says Professor A. L. Goodhart¹, "which is more uncertain and difficult than that which is concerned with the effect of mistakes on the formation of contract and of the various problems which have arisen here the most disputed seem to be those in which questions concerning the identity or the existence of the parties are in issue". It was only sixteen years ago that C. J. Slade wrote his memorable article, 'The Myth of Mistake in the English law of Contract.'² "Mistake as such" he declared, "has no operative effect whatever at law"³. This was, as J. C. Hall observed, good news for the student⁴, but in fact problems of error in *personam* are almost bafflingly frowning at the face of the student as there is a very lamentable lack of any successful key to unlock this problem of error in *personam*.

The scope of this article is a brief survey of the various attempts by the most eminent English jurists and text book writers to rationalize the cases on this topic and to see how far rationality has been injected into this confused and difficult branch of the law. To throw light on certain inequities and defects in the existing law on this topic is one of the aims of this article. Desirable amendments in order to make this branch of the law conform to justice and equity and to plug the loop-

holes in the present law on this topic are also suggested in this article.

Error in personam:—Where the offeree is aware of the offeror's true intention the sense of the offer must be judged subjectively i.e., how would a reasonable person with the offeree's knowledge have interpreted the offer. If he would have interpreted it as confined to a person other than the offeree, then the offeree is deprived of the right to insist that the defendant shall be bound by that which was only the apparent and not the real bargain.

Thus in *Cundy v. Lindsay*⁵, the contract was void because the plaintiff's offer to the knowledge of Blankarn, the offeree was addressed to Blankiron & Co. Therefore, the fraudulent Blankarn who purported to accept it could not bind the offeror. Blankarn was acting here just in the same way as if he had forged the signature of Blankiron & Co., the respectable firm in the order for goods. Similarly in *Lake v. Simmons*⁶, the appellant thought that he was dealing with a different person, the wife of Vander Bergh, and it was on this footing alone that he parted with the goods. He never intended to contract with the woman in question. It was by deliberate fraud that she got possession. No doubt physically the woman entered the shop and pretended to bargain in a particular capacity but only on the footing of being a different person from what she really was. In *Boulton v. Jones*,⁷ A, who had been in the habit of dealing with B sent a written order for goods directed to B. But C, who on the same day had bought B's business executed the order without giving A any notice that the goods were not supplied by B. In this case C must have known that A intended to address his offer to B alone, because he had a set-off against

1. Mistake As to the Identity in the Law of Contract, L.Q.R., Vol. 59, p. 228.

2. L.Q.R. Vol. 70, p. 385.

3. L.Q.R. Vol. 70, p. 407.

4. Cam.L.J. 1961, p. 86.

5. 2 Q.B.D. 96 (C.A.)

6. 1927 A.C. 487.

7. (1857) 2 H. & N. 564.

him *C* failed in the action to recover the price of the goods. The order was to *B*, i.e. *C*'s predecessor in business and *C* accepted it knowing that it was intended for *B*.

It is not enough for the mistaken party to allege mere mistake as to the other's identity. He must, according to *C. J. Slade*, show that his offer or acceptance on its true construction was not made to the world at large but was at least so confined in its range as to exclude the other party from accepting it and holding him to it.⁸ In *King's Norton Metal Co. v. Edridge Merrett & Co.*⁹ the mistaken plaintiff was unable to satisfy this requirement. If it could have been shown that there was a separate entity called Hallam & Co. and another entity called Wallis, then the case might have come within the decision in *Gundy v. Lindsay*.¹⁰ Here there was a contract by the plaintiff with the person who wrote the letter by which property passed.

Similarly in *Phillips v. Brooks*,¹¹ Horridge J. quoted the American case of *Edmundy v. Merchant D. Spatch T. Co.*¹² 'The minds of the parties met and agreed upon all the terms of the sale: the thing sold, the price and time of payment, the person selling and the person buying. The fact that the seller was induced to sell in fraud of the buyer made the sale only voidable but not void.'

In truth there are few cases of mistaken identity where the mistaken party could prove that his offer or acceptance was on its true construction confined in its scope except by showing that he intended to address it to some other identifiable individual. It is for this reason that *Sowler v.*

*Potter*¹³, raises difficulties. As Professor Goodhart has pointed out it was not possible to imply such a term in *Sowler v. Potter*.¹⁴

"Previous attempts to rationalise the cases on this topic," says J. F. Wilson¹⁵ (Lecturer in Law, University College of Wales), "have equated mistake as to identity with a positive intention to make a contract with a person other than the one with whom the contract at issue apparently has been concluded." Thus Mr. Taylor has argued¹⁶ as Professor Goodhart has opined in his article¹⁷, that an apparent contract with *B* is void not because *A* did not intend to deal with *B* but because he intended to deal with *C*, a third identifiable party. Similarly, Cheshire and Fifoot state that an agreement apparently concluded between *A* and *B* is a nullity on the ground of mistaken identity if it is proved —(i) that *A* did not intend to contract with *B* but with *C* and (ii) that this fact was known either actually or identifiably to *B*.¹⁸

To these accepted tests objection has been raised by J. F. Wilson. "With all deference to the learned writers," says J. F. Wilson, "it is submitted that the approach to the problem is wrong."¹⁹ First it confuses a method of proving mistake with the fact of mistake itself. Mistake does not lie in proof of an intention to deal with *C* but rather in the absence of intention to deal with *B*, i.e., lack of the consent requisite to create the contractual tie. The introduction of the third identifiable person, is merely useful as a method of proving the fact of mistake, for it is

8 L.Q.R. Vol. 70 The Myth of Mistake in Contract, p. 394.

9 (1897) 147 L.R. 93 (C.A.).

9-a 2 Q.B.D. 96 (C.A.).

10 (1919) 2 K.B. 243.

11 (1833) 135 Mass. Rep. 283.

12 (1940) 1 K.B. 271.

13 "Identity in Contract and Pothier Fallacy" Mod. L.R. Vol. 17 p. 515.

14 11 M.L.R. 257, 260.

15 57 L.Q.R. 228 Mistake As to the Identity in the Law of Contract.

16 3rd Ed. p. 197.

17 O.J. Cit. p. 515. See Mod. L.R. Vol. 17 p. 515.

wrong to regard a method of proving a fact as the fact itself. Moreover this test imposes an artificial limit to the doctrine of mistake with the result that half the decided cases on the subject have to be rejected. Further this artificial test results in some curious anomalies. Thus if *X* consistently refuses to deal with *Y* but *Y* finally obtains from *X* the goods by the use of a false name on a mailed order the contract cannot be held void for mistake unless the false name represents a third identifiable person. To argue that if there is no identifiable third party (as in *King's Norton Metal Co. v. Edridge Merret & Co.*¹⁸ the contract is not void and that if there is an identifiable third person as in *Cundy v. Lindsay*¹⁹ the contract is void—such a conclusion appears artificial and is merely reached by a self-imposed limitation as the doctrine of mistake.

Cheshire and Fifoot (1969 Edition) suggest the following test:

“Suppose it is alleged, that *A* intended to make an offer to *B* and to *B* only but that by mistake he addressed it to *C* and that *C* accepted it. If this allegation can be proved and if *A*'s intention was known to *C*, at the time of acceptance there is logically no correspondence between offer and acceptance and therefore there should be no contract. The presumption in this type of cases is that, despite the mistake, a contract has been concluded between the parties since the offer was accepted by the party to whom in fact it was addressed. The onus of rebutting the presumption lies upon the offeror.

In order to succeed he must show (i) that at the time of making the offer he regarded the identity of the offeree as a matter of vital importance; (ii) that he intended to deal with some person other

than the acceptor; (iii) that the latter was aware of the fact.”²⁰

The new test proposed by

Mr. J. F. Wilson is as follows :

The question is not with whom did *A* intend to contract? It should be did *A* intend to contract with *C* with whom he has apparently entered into legal relation? *A* can hold such a contract void only if it is satisfied that *A* did not intend to make this contract with *C* and that *C* was aware of the fact. If the problem of mistake is viewed from this aspect the difficulties raised by such cases as *Philips v. Brookes*²¹ and *Sowler v. Potter*²², are not as great as they appear at first sight. The most obvious method of proving such mistake is to prove that *C* was well aware that *A* intended to deal with *B* and with *B* only, for this effectually negatives an intention to deal with *C*. This seems to be the line adopted in *Cundy v. Lindsay*²³. Another method is to prove that *A* had no intention to contract with any one and therefore did not intend to deal with *C*. “A third suggested method” says Mr. Wilson, “is by proving that *A* has expressly indicated to *C* that he will not deal with him and then subsequently appears to have entered into such a contract as the result of a trick e.g. *Said v. Butt*.”²⁴

This new test can be effectively applied to the eleven cases²⁵ decided within a period of ninety-five years e.g. *Cundy v. Lindsay*²³,

20. 7th Edn, p. 214.

21. (1919) 2 K.B. 243.

22. (1940) 1 K.B. 271.

23. 2 Q.B.D. 96 (C.A.)

24. (1920) 3 K.B. 497.

25 These eleven cases are :—(i) *Boulton v. Jones*, (ii) *Hardman v. Booth*, (iii) *Cundy v. Lindsay*, (iv) *King's Norton Metal Co. v. Edridge*, (v) *Baillie's Case*, (vi) *Gorden v. Street*, (vii) *Philips v. Brookes*, (viii) *Lake v. Simons*, (ix) *Said v. Butt*, (x) *Sowler v. Potter* and (xi) *Dennant v. Skinner*.

18. (1897) 147 L.R. 98 (C.A.)

19. 2 Q.B.D. 96 (C.A.)

Hardman v Booth^{25-a}, etc. In each of these there appears the identifiable third person. Yet according to Mr Wilson the decisions turn on a lack of intention to deal with *C* rather than on a positive intention to deal with *B*. In *Boulton v Jones*¹, also it is worthwhile to note that there is no suggestion throughout the judgment that proof of an intention to deal with another identifiable person is the only method of establishing a mistake.

To refute the 'third identifiable person' approach to mistake, Wilson relies on two passages from the work of academic lawyers who support that method. The second paragraph in the section dealing with mistake as to identity in Anson's *Law of Contract*^{1-a} supports Wilson's thesis when it says: "we may start with the proposition that a person cannot constitute himself a contracting party with one he knows or ought to know has no intention of contracting with him". Then Wilson quotes the following passage from an article written in 1932 by Prof. Goodhart and Mr. Hamson: "It is an axiom that in a transaction between *A* and *B* if *A* knows that *B* will not (from any motive) contract with him, but nevertheless attempted to steal *B*'s consent to contract, he cannot, having purported to steal *B*'s consent, pretend that there is a contract between himself and *B* on any view of a contract because neither is there consent, consent not being capable of being stolen nor has *A* any reasonable expectation that consent was given by *B* to that contract. Wilson's submission is that once *B* has proved to the satisfaction of the Court that he did not intend to make his apparent contract with *A* and that *A* was aware of the fact then the contract is void for mistake regardless of whether *B*

intended to deal with a third identifiable person.

The cases of *Sowler v Potter*², and *King's Norton Metal Co v Edridge*³, are considered irreconcilable. In both these there is no third identifiable person. Yet the decision in the one is contrary to that in the other. *Philips v Brooke*⁴ is said, to be wrongly decided and the remaining cases in the eleven are censured since their judgments rely to a large degree upon Pothier's test. Mr J. F. Wilson contends that all these cases can be reconciled if the suggested test for mistake is accepted. Pothier's test: what is its true nature?—²¹ The test is "does error with regard to the person I contract destroy the consent and annul the agreement"? According to it mistakes as to identity will not operate to annul an apparent contract unless the plaintiff can prove that consideration of the person formed an element in the contract. If it did form an element in the contract it is void even without a third identifiable person. Professor Goodhart has pointed out that the case of *Said v Butt*⁶ deals with the position of an undisclosed principal rather than with the point of mistake. But Mc Cardie J. treated the facts of this case as though *A* had disguised himself as *C* in order to obtain a ticket from *B*. Two points in this judgment are important. First Pothier's test is cited merely to prove that a reasonable man might expect *B* to be vitally interested in the identity of the purchaser of the ticket, for, if he was willing to sell to all comers how could he allege that he did not intend to sell a ticket to *A*? So per Mc Cardie, J., *A* first night therefore is a special event with special characteristics. As the plaintiff

25-a (1863) 32 L.J. Ex. 105

1 (1857) 2 H. & N. 564

1-a 22nd Edn p. 274

2 (1940) 1 K. B. 271

3 (1897) 147 L.R. 98

4 (1919) 2 K. B. 243

5 For more about Pothier's test see Mod. L.R. Vol. 20 p. 38

6 (1920) 3 K. B. 497

himself stated in evidence, the management only disposes of the first night ticket to those whom it selects.

Secondly the judgment concentrated on proof of mistake, not on the fact that *B* intended to sell the ticket to *C* but on the fact that he did not intend to sell it to *A* who was well aware of the fact. This satisfies Wilson's condition. The personal element was there strikingly present.

A higher degree of care is needed in the case of mistake *inter presentes*. In the most controversial of these cases, *Philips v. Brooks*⁷, the plaintiff had to prove that he did not intend to deal with North. A third identifiable person was present in the person of Sir George Bullough, but the mere introduction of the name of Sir George does not render the contract *ipso facto* void for mistake, for a name is no more than an attribute. Consequently the trial Judge had to decide whether the jeweller intended to deal exclusively with Sir George Bullough or intended to deal with the customer before him though believing him to be Sir George Bullough. Only in the first case will the contract be void for mistake and Horridge, J., was not of the opinion that such an exclusive intention existed. His Lordship observes: I have come to the conclusion that although he believed the person to whom he was handing the ring was Sir George Bullough he in fact contracted to sell and deliver it to the person who came into his shop and was not Sir George Bullough but a man of the name of North who obtained sale and delivery by means of the false pretence that he was Sir George Bullough. The same view of the judgment is taken by Lord Haldane in *Lake v. Simmons*⁸ where he states: "Horridge, J., found as a fact that though the jeweller believed the person to whom he handed

the jewel was the person he pretended to be, yet he intended to sell to the person whoever he was who came to the shop and paid the price and that the misrepresentation was only as to payment. There was therefore consensus with the person identified by sight and hearing." Hence Mr J. F. Wilson submits that *Philips v. Brooks*⁹, can be easily reconciled with the decision in *Hardman v. Booth*¹⁰, where *A* at the outset intended to deal with Gandel & Co. and never for a moment thought of dealing with the person before him except as a representative of the firm. The mere fact that both transactions took place *inter presentes* does not mean that the decision in both cases should be identical. They are distinguished in that in *Philips v. Brooks*⁹, the trial Judge found as a fact that the jeweller intended to deal with the person before him regardless of his identity, whereas in *Hardman v. Booth*¹⁰, the Court found as a fact that the plaintiff did not intend to deal with the person before him.

*Philips v. Brooks*⁹, is expressly followed in the recent case of *Dennant v. Skinner*¹¹, where Hallet, J., deals with the problem of mistake not by enquiring whether the plaintiff intended to deal with *C* but by discovering whether he had given any proof of an intention not to deal with *B*. It is well agreed that upon a sale by auction a contract is completed on the fall of the hammer. Up to that time Mr. Dennant had not inquired the name of the bidder. He had knocked down the van to the man who had bid, whatever the top bid was irrespective of the identity of that particular man. In *Dennant v. Skinner*¹¹, "there was no mistake as to the contracting parties at the time of the contract of sale was made". The bid for the van was accepted before his representation.

7. (1919) 2 K.B. 243.

8. (1927) A.C. 487.

9. (1919) 2 K.B. 243.

10. (1863) 32 L.J. Ex. 105.

11. (1948) 2 K.B. 164.

In *Lake v Simmons*¹², A posed as the wife of B and by this means obtained from a jeweller possession of two necklaces for the purpose of showing them to B and C for their approval. In holding that no contract existed between A and the jeweller both Lord Haldane and Viscount Sumner emphasise the fact that the jeweller did not intend to deal with A rather than the fact that he intended to deal with B and C. Thus Lord Haldane observed: "The appellant thought that he was dealing with a different person, the wife of Van der Bergh and it was on that footing alone that he parted with the goods. He never intended to contract with the woman in question." Again Viscount Sumner said: "She was not the person who was to approve or return them; that was Mr Vander Bergh or Commander Digby. If there was entrusting it was to one of them. It cannot be argued that the decision was only reached by proof of an intention to deal with a third identifiable person for it is interesting to note that Commander Digby was a figment of Miss Ellison's ((A's) imagination and had no existence in fact. *Lake v Simmons*¹² the one House of Lords authority in the field of error in *personam* has according to Devlin L.J. left the question in *inter presentes* open for consideration by the House.

The decision in *Sowler v Potter*¹³ raises difficulties. To establish a plea of mistake in this case the plaintiff had to prove that she did not intend to lease the premises to the defendant and that the defendant was aware of the fact. The Trial Judge, Tucker J., employed Pothier's test not to decide whether mistake exists but merely as a preliminary before allowing the plaintiff to prove any mistake with regard to identity. He said: "I think that this case of landlord and tenant is clearly one where considerations of

the person with whom the contract was made was a vital element in the contract and that therefore if there was any mistake on the part of the plaintiff with regard to the identity of the person with whom she was contracting the contract is void." Tucker J. had then to decide whether in this particular case mistake existed (i.e.) whether the plaintiff had shown a definite intention not to deal with the defendant. A definite intention not to deal with is necessary. The final decision on this point must be on the facts of each particular case. The evidence showed that the agent thought that the person with whom he was contracting was not Mrs. Ann Robinson who had been convicted of an offence a short time beforehand. She never intended to deal with this identifiable person of whose existence she was aware. Whether or not Tucker J. was correct in reaching this conclusion on the fact may be doubted but there can be no doubt that he was personally satisfied that the plaintiff did not intend to make the contract with the defendant and based his decision on that ground. So any error on his part J.F. Wilson says would not be one on principle but one of applying principle to facts. What is important to be noted is that criticism based on absence of third identifiable person appears to be unjustified.

*Sowler v Potter*¹⁴ has attracted almost universal criticism and the decision in it has been frequently suggested to be irreconcilable with that in *King's Norton Metal Co v Edridge*¹⁵, and on that ground alone it has been held that *Sowler v Potter*¹⁶ is wrongly decided. A brief glance at the facts of the former case will show that the suggestion is misleading. In the opinion of the Court of Appeal the content on that the Plaintiff did not intend to deal with Wallis failed

12. (1977) A.C. 487

13. (1940) 1 K.B. 271

14. (1940) 1 K.B. 271

15. (1897) 147 L.R. 98

16. (1940) 1 K.B. 271

because "the question was with whom upon this evidence which was all oneway did the plaintiff contract to sell the goods? Clearly with the writer of the letter."

The plaintiff could not establish an intention not to deal with Wallis by proving an exclusive intention to deal with Hallam & Co., for the two were identical. The evidence in fact proves the opposite, for the facts show that there had been previous dealings between the parties and consequently the Court would either have to hold that the plaintiff never intended to make any of the contracts with Wallis, or that he intended to make them all. For if the previous contracts were good the plaintiff in this case obviously intended to deal with the person who had made the other contracts. According to A. L. Smith, L. J., this was nothing more than a long term fraud. The plaintiff failed because the facts proved conclusively that he intended to deal with Wallis whereas in *Sowler v. Potter*¹⁷ the trial Judge was satisfied that the plaintiff in that case did not intend to deal with Mrs. Robinson. So it is wrong to suggest that *Sowler v. Potter*¹⁷, is irreconcilable with *Kings Norton Metal Co. v. Edridge*¹⁸, though in both cases the fraudulent party assumed fictitious names.

A difficult problem arises where *A* intending to make an offer to *B* makes it to *C* by mistake. No single answer can be given because the result depends on whether or not *C* knew of the mistake when he accepted the offer. In the first case there is no contract because *C* knows that *A* does not intend to make the offer to him. There is no question of personality here. The offer cannot be accepted by the named offeree because he knows that it is not meant for him. The parties to a contract are specific persons and not merely names. But if *C*

does not know of *A*'s mistake when he accepts the offer, then *A* is bound unless *C* might, as a reasonable man have known that the offer was not meant for him. If *A* so expresses himself that *C* reasonably believes that the offer is intended for him then *A* is bound even though he (*A*) can prove that he had made a mistake. If Thomas by mistake makes an offer of marriage to Theresa when he intends to make the offer to Mary he is bound if Theresa reasonably believes that his offer is addressed to her and hence accepts the offer.

Professor Goodhart points out that a statement made by Pothier concerning French Law has been cited with approval by English Judges with the result that the clarity and simplicity of English Law on the point has been maried.

"If that statement could be buried", says Professor Goodhart "Once and for all the chief source of confusion would disappear." The impugned statement of Pothier is as follows. "Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract." It is also stated by Pothier that when such consideration does not enter at all into the contract, the contract ought to stand. Professor Goodhart observes that this statement is untrue in English Law, for it substitutes for the English test, "How ought he to have interpreted the promise;" the entirely different one "what did the promisor intend when he made his promise." Pothier's statement is quoted for the first time by Fry, J., in *Smith v. Wheatcroft*¹⁹. Here the plaintiff had entered into a contract for purchasing the defendant's land as agent for an undisclosed principal, Butler Colliery Co. The defendant raised the point that

17. *Ibid.*

18. (1897) 147 L.R. 98.

19. (1863) 1 H. & C. 803.

the plaintiff when he made the contract knew that the defendant was unwilling to sell the land to the Colliery Co., Fry, J. found that the defendant had not shown that any personal consideration entered into the contract. The citation of Pothier here, says Professor Goodhart, had three defects: (1) it was unnecessary, (2) he was dealing with the question of an undisclosed principal in other than contract, and (3) the statement was wrong.

The most difficult problem in error in *personam* arises when the person contracting is present. *Philips v Brooks*²⁰, the leading case on this point has given rise to a conflict of opinion. A man entered the plaintiff's shop, selected pearls and rings, wrote out a cheque saying 'I am Sir G. Bullough'. The plaintiff knew that there was such a person as Sir G. Bullough and believing that the purchaser spoke the truth permitted him to take the jewels. Fraudulent purchaser North pledged the ring with the defendant Horridge. J. held that the sale was voidable but not void because the seller intended to contract with the person present. The learned Judge seems to have taken the view that there can be no operative mistake as to identity *inter presentes*. Professor Goodhart says that mere presence by itself cannot have so remarkable an effect. *Hardman v Booth*²¹, is a strong authority against such a view and Professor Goodhart observes in his article 'Mistake as to identity in the law of Contract' that *Philips v Brooks*²² is incorrectly decided. But according to the test of J. F. Wilson as we have seen above *Philips v Brooks* it is submitted with due deference, does not present a great difficulty.

Suppose A makes an offer to B in the belief that B is not B and B knows the error. Here A is willing to contract

with anybody except B. At first sight the situation seems to be similar to that where A makes an offer to B in the belief that B is C and B is aware of the mistake. There is a fundamental difference between the two. In the latter case there is no contract because A's offer is really made to C and B knows this. The situation is therefore nothing more than that in *Boulton v Jones*²³, or *Cundy v Lindsay*²⁴, where B attempted to accept an offer made to C. On the other hand in the first case the offer is made to B although A is mistaken in his belief that B is not B. Therefore if there are no other circumstances in the case B can accept the offer and there is a binding contract. There is a difference between not knowing who the person is with whom one intends to contract and making a mistake as to the identity of a third person. Professor Goodhart makes the distinction clear by two illustrations: (1) B knows that A does not wish to enter into contract with him. Therefore B disguises himself to look like C and enters into a contract with A. The contract is void as A's offer was intended for C and B cannot accept it. (2) B knows that A does not wish to enter into a contract with him. Thereupon B disguises himself with a false beard so that A does not recognise him and enters into a contract with A. In this case as A intended to deal with the person who was present, although he would not have done so if he had known that he was B, the contract is not void although it may be voidable on the ground of fraud. Here there is no term in the contract that B is not B. Anson holds^{24-a} that this contract is valid and binding. However if the offer made by A expressly or impliedly contains a stipulation that B is not B the position is that in *Said v Butt*²⁵. Here the plaintiff wished to

23 (1857) 2 H & N 564

24 2 Q.B.D. 96 (C.A.)

24-a English Law of Contract 22nd Edn 280

25 (1920) 3 K.B. 497

20 (1919) 2 K.B. 243

21 (1863) 32 L.J. Ex. 105

22 (1919) 2 K.B. 243

attend the first night performance of a play. He knew from past experience including an express refusal that if he himself applied for a ticket it would be refused to him. He therefore got a friend to buy a ticket without disclosing that he was buying it for the plaintiff. He was, nevertheless not admitted to the theatre and sued for breach of contract. It was held that no contract had come into existence. The plaintiff knew that the theatre would not contract with him as there was already an express refusal by the theatre authorities.

It is not necessary to consider whether the assumption of an *alias* for the purpose of concealing one's identity constitutes fraud in the case of *Sowler v. Potter*¹, because the defendant did commit a clear fraud when she gave the plaintiff a fraudulent reference as to character. It is unfortunate as Professor Goodhart points out that in the report in the Law Reports the point has been omitted because it was the most important element in the case and explains the result. This is also the reason why Professor Goodhart observes that the law of mistaken identity has been sufficiently confused by *Philips v. Brooks*.² We can only hope that *Sowler v. Potter*¹, will not add to our troubles. Professor Goodhart strongly advocates the burial of Pothier's statement.

"Mistake as such" C. J., Slade declared "has no operative effect whatever at law". This reassurance has now been disturbed by the recent case of *Ingram v. Little*³, which reminds that the offer and acceptance test of C J., Slade is no magic formula acting as a ready panacea for all the ills caused by error in *personam*. The facts of the case lie in a short compass. The ladies who wished to sell their car were offered an acceptable price by a stranger but they made it plain that they would not accept pay-

ment by cheque. He then pretended to them that he was a certain P. G. M. Hutchinson and quoted an address which the ladies found to be one shown in the telephone directory. Mistakenly satisfied that they were dealing with P. G. M. Hutchinson (and believing that he was a man of substance) the ladies agreed to sell their car in return for a cheque and handed over possession. By the time the fraud was discovered, the defendant had bought the car in good faith. The ladies sued him for conversion arguing that their contract with the rogue was void and that consequently no property in the car had ever passed. The judgment of Slade, J. was for the plaintiff. The Court of Appeal makes it clear that Slade, J., founded himself on Professor Goodhart's article 'Mistake as to identity in the Law of Contract' and asked the question there suggested, namely, how ought the promisee to have interpreted the promise. He treated the ladies as having made an offer to sell, but an offer which it was intended (and....known to be intended) only for the real P. G. M. Hutchinson. Thus it could have been accepted by him alone and no contract resulted.

J. C. Hall in his "New Developments in the law of Mistake of Identity"⁴, has considered *Ingram v. Little*⁵, in a few aspects. They are briefly as follows : (1) *Knowledge of the person named* :— English Law has never decided whether I must know the person with whom (rather than the rogue) I claim I meant to contract. A has already refused to deal with B. B then telephones A and makes the same proposal but disguises his voice and says he is Lord C. In fact there is no Lord C. A is impressed and enters into an agreement with the speaker. Is the contract void ? On the authority of *King's N. Metal Co. v. Edridge*⁶, it is not,

1. (1940) 1 K.B. 271.

2. (1919) 2 K.B. 243.

3. (1961) 1 Q.B. 31.

S J—4

4. (1961) Cam.L.J. p. 86.

5. (1961) 1 Q.B. 31.

6. (1897) 147 L.R. 98.

for there is no other entity with whom *A* intended to contract

Admittedly *Sowler v Potter*⁷, could be cited in support of a contrary conclusion, but that decision is heavily criticised by Professor Goodhart and disapproved by Denning L J in *Solle v Butcher*⁸. So the person named *C* must actually exist in order to make the contract void, but see the test of J F Wilson above where he says the existence of a third identifiable person and the proof of intention to contract with him is unnecessary to make the contract void for mistake as to identity. Personal knowledge of the third identifiable person is not a necessary feature to make the contract void according to J C Hall. It will be void if *A* has some knowledge of the third identifiable party's existence. That was the position in *Ingram v Little*⁹. Adoption of an *alias* will not render the contract void if the name is that of a person quite unknown.

(2) *Lesson from New Zealand* —The recent New Zealand case of *Fawcett v Star Car Sales Ltd*⁹, was not found helpful in *Ingram v Little*⁹. There *B* standing before *A* with a motor car which *B* wished to sell to *A* pretended (1) that she was *C* whose name was on the certificate of registration and (2) that she owned the car having sold it to some one who authorised *B* to sell. The New Zealand Court held that the contract was not void. According to J C Hall, even in *Ingram v Little*^{9-a} the more satisfactory solution would be to hold that a contract arose despite the mistake of identity as in the New Zealand case.

(3) *Practical difficulties in the application of the offer and acceptance test* — J C Hall suggests that for convenience the mistaken party may be treated as the offeror even though in fact he was the

offeree. So in *Ingram v Little*^{9-a}, the ladies were treated as offerors. Sellers J, in *Ingram v Little*^{9-a} did not agree with Professor Goodhart that *Phillips v Brooks*¹⁰, was wrongly decided. He said it was a border line case decided on its own particular facts. The particular difficulty experienced in applying the offer and acceptance test in the face to face situation stems therefore from the inescapable fact that the only actual intention at the time was to make an agreement with the person present even though there would have been no such intention had the truth been known.

(4) *A New solution* —Devlin, L J, said there must be a presumption that a person is intending to contract with the person to whom he is actually addressing the word of contract. But this presumption is rebuttable, consider the case where *A* on being approached by *B* refuses to deal with him and *B* later returns disguised as *C* and *A* then makes the very agreement he at first refused to make. Surely here the above presumption is rebutted. The application of the presumption certainly cuts through the initial difficulty in the error *inter presentes* situation, but it does not by itself solve the problem.

In *Gundy v Lindsay*¹¹, and *Lake v Simmons*¹², because the apparent contract between the dealer and the rogue is decided to be void the *bona fide* purchaser suffers for no fault of his. On the other hand if the contract between the dealer and the rogue was found to be voidable as in *Phillips v Brooks*¹³, or *Kings Norton Metal Co v Edridge*¹⁴, the *bona fide* purchaser as he purchases before the voidable contract is rescinded gets a good title.

7 (1940) 1 K B 271

8 (1950) 1 K B 671 (C A)

9 (1960) N.Z.L.R. 406 (C A)

9-a (1961) 1 Q B 31

10 (1919) 2 K B 243

11 2 Q B 96

12 (1927) A C 487

13 (1919) 2 K B 243

14 (1897) 147 L R 98

The true spirit of common law is to override the theoretical distinctions between void and voidable contracts when they stand in the way of doing practical justice. The question should not be whether the contract was void or voidable but which of the two innocent parties should suffer. To that question the "plain answer is that the loss should be divided between them in such proportion as is just in all the circumstances" If it is pure misfortune the loss should be borne equally ; if the fault or impudence of either party has caused or contributed to the loss it should be borne by that party in the whole or in the greater part. If the proposal is confined to a situation where the owner has deliberately handed over his goods under an apparent sale the case for implementing it by legislation seems well nigh overwhelming.

But until legislation intervenes, are the Courts to apply vigorously the settled and well known rules of law as Lord Cairns pointed out in *Gundy v Lindsay*^{14-a} Should the rigours of the orthodox rules not be mitigated in appropriate circumstances by the doctrine of estoppel ? If an owner has carelessly handed over goods with the ostensible intention of passing the property should he not be estopped from relying on his mistake as against a third party who has purchased them in good faith ?

The majority decisions in the Court of Appeal in *Central Newbury Car Auction Ltd. v. Unity Finance Ltd*¹⁵, seem to stand in the way of the application of estoppel in these circumstances. There the owner who carelessly handed over the car and its registration book to a rogue and who was held not to be estopped from denying the rogue's right to sell it to the defendant had never intended to transfer the property to the rogue himself (but to a finance corporation from whom the

rogue was to hire it). The judgment of Morris, L. J., (one of the majority) shows that the operation of estoppel is now so restricted that it would not even apply normally where the owner had through negligence ostensibly transferred the property to the rogue himself, for the element of negligence involved a duty to take care, viz., *Candler v. Crane Christmas Co.*¹⁶, according to which damages cannot be recovered for negligent misrepresentation

But *Candler v. Crane*¹⁷, is given a decent burial by *Hedley Byrne & Co., Ltd. v. Heller & partners*¹⁸. The rule in *Hedley Byrne*¹⁸, gives a man in the street a remedy if he has relied on negligent misstatement even if he has not bargained. The duty to take care, it is submitted, has become more extensive than it was before *Hedley Byrne case*¹⁸. "*Hedley Byrne*¹⁸, might even be held to cover situations now discussed under the rubric of quasi-estoppel." It cannot be that ownership is lost on the basis of enduring punishment for carelessness. The possibility of estoppel was not even mentioned in the case of *Ingram v Little*.¹⁹

The Judges in *Ingram v. Little* seem to have taken no notice of the salutary view propounded by Denning, L. J., that the common law rules of mistake have been superseded by equity. If other judges are not paying attention to this very valuable and novel suggestion of Denning, L. J., it is for the Legislature to enact laws in consonance with equity.*

16. (1951) K B. 164.

17. (1951) All E.R. 426.

18. (1963) 2 All E.R. 575.

19. (1961) 1 Q.B. 31.

* Imponderable indeed is the indebtedness of this writer to very eminent jurists like Prof. Goodhart, J. F. Wilson, Cheshire and Fifoot Anson, J. C. Hall, C.J. Slade and a few others.

14-a. 2 Q.B. 96

15. (1957) 1 Q.B. 37.

ECONOMIC JUSTICE AND THE INDIAN CONSTITUTION

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"During the last few centuries the modern National State has had an increasing tendency to become the Leviathan of which Hobbes wrote, not only the repository of physical and legal restraining power and the protector of the nation against an external enemy but also the main directive force in the shaping of the economic and social life of the nation. It has gradually absorbed, unified and come to control most of the functions previously exercised by social groups—merchants landowners craftsmen's guilds, churches. Are we in the process of another dialectic reversal? (W. Friedmann)

I

The Preamble to the Constitution of India states as one of the objectives securing to all its citizens justice, social, economic and political. Justice briefly speaking is the harmonious reconciliation of individual conduct with the general welfare of society. Every man acts according to his self interest but his act or conduct is said to be 'just' only if it promotes the general well being of the community.

Our Constitution realises that a true democracy requires not only equality but also justice. As a result of this two fold ideal it not only provides for securing equality of status and opportunity by prohibiting discriminations by the State on grounds of religion race etc., it also provides for abolition of all sorts of inequities which result from inequalities of wealth and opportunity.

The ideal of economic justice means that there will be no distinction between man

and man from the standpoint of economic value. It means, equality of reward for equal work. Every man should get his just dues for his labour. It also means the abolition of those economic conditions which ultimately result in the inequality of economic value between man and man viz., concentration of wealth and means of production in the hands of a few. Though the Indian Constitution is not tied to any particular school of social philosophy like socialism communism or the like and though it does not advocate State ownership of the means of production it holds out the above ideals of economic justice in its chapter on the Directive Principles of State Policy.

Lowenstein has very rightly observed 'Liberty, the Constitution could and did promise but not bread and modicum of economic security the little man yearns for. To him it is plain and unadorned truth that the political decisions which are vital for the well being of all no longer occur within the framework of the Constitution. The social forces move and battle extra constitutionally, because the Constitutions did not even attempt the required solution. "Concentration of private power mainly in the form of economic controls in the hands of a few individuals is equally destructive of the dynamic qualities of a democratic society as a dictatorial government could be. The framers of the Constitution turned their attention to deal with the possible future menace of concentration of economic power in the hands of capitalists and to ensure the establishment and sustenance of a society which provided for the diffusion of economic power among the different sections of the people. The methods they sought to provide for the purpose are embodied in Part IV of the Constitution entitled Directive Principle of State Policy.

Directives are an emphatic re-assertion of our Fundamental Rights. They

demand a realistic approach and make it the moral duty of the State to establish a social order in which equality, liberty and justice in all spheres of life—social, economic and political, may be possible. The chapter on Fundamental Rights is an exposition of ends, the chapter on Directives is a study of means. If one is philosophy of good life, the other is its practice.

The Directive Principles lay down the socio-economic norms intended to rejuvenate the old norms that helped to evolve democratic institutions in the world. Having made the declaration embodied in the Preamble and having taken note of mass illiteracy, poverty and underdeveloped economy the framers of the Constitution laid down certain lines of action. The framers directed that the State should try to carry on the constructive activities which may help to usher in a new era of prosperity for the people of India. The State is required to promote the welfare of the people by securing a social order in which one is assured of justice, social, economic and political. Every member of the society should be able to earn his living. He should get fair wages. Weaker sections of the society should receive special attention. Old, sick and physically disabled should get special assistance and care. The State should work for development of the material resources of the society. Concentration of wealth and means of production in the hands of a few should be prevented in the interest of the society as a whole. Level of nutrition and standard of living should improve under just and humane conditions of work.

The programme set out was an endeavour to establish a socialistic pattern of society. Although Sir Iver Jennings had remarked that "the ghosts of Sidney and Beatrice Webb stalk through the pages of the text, Part IV of the Constitution expresses

Fabian Socialism without the socialism", in fact as well in effect it aims at a society which is neither communistic nor a society based on *laissez-faire* economy. It is a society characterised by humanism, endurance and higher values. It attempts a synthesis of principles of socialism, individualism and collectivism.

II

India is essentially a federation. The great problem of any federal structure is to prevent the growth of sectional and local interests which are inimical to the interests of the nation as a whole. The strength of the Union may be achieved only by minimising inter-State barrier as much as possible. One of the means to achieve this is the freedom guaranteed to every citizen to trade with any part of the country. The progress of the country as a whole also requires free flow of commerce and intercourse as between different parts, without any barrier. This is particularly essential in a federal system. The Constitution was "framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not in division. What is ultimate is the principle that one State in its dealing with another may not place itself in a position of economic isolation."¹ The freedom of inter-State trade and commerce means that no State shall, either directly or indirectly impose a prior restraint upon trade and commerce between itself and another. The restraint is equally bad, whether it attacks inter-State trade alone or in company with the State's own domestic trade. Again, subsequent punishment, in so far as it operates as a prior restraint and is likely to deter the trade by fear of punishment, is also an infringement of the freedom. It includes the freedom not only of the instruments by which inter-State trade is carried on,

1. *Baldwin v. G. A. F. Inc.* (1934) 294 U.S. 511.

but also of the persons engaged in it, with respect to the act of trade and commerce. In short it means that every owner of goods shall be at liberty to make such contracts for the transportation of goods from one State to another as he thinks fit without interference by law.²

When a State imposes a general tax e.g. a tax on motor vehicles for the use of its highways, which is payable by persons engaged in intra State as well as inter-State commerce anybody who complains that it constitutes an unreasonable burden on inter State commerce must show either that the tax has no reasonable relation to the inter State operations or that the tax is levelled against inter State commerce, being in some way or other increased by reason of inter State operation of the persons taxed.³

But freedom of trade or intercourse does not include the freedom of choice of means i.e. the right to transport goods or to travel to a place in whatever vehicle or by whatever route or at whatever time or at whatever speed he may choose. A non discriminatory limitation as to choice of means is not necessarily inconsistent with the freedom guaranteed by Article 301. This is made clear by Articles 302-3. Article 302 provides that Parliament may by law impose such restrictions on the freedom of trade commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest. Restriction would include the power of total prohibition or expulsion if the commerce in question spreads an evil which is irresistible in nature or where the traffic or commerce is unlawful e.g. carrying liquor in a public carriage for the use of passengers. Restrictions in the public interest would include the power

—(1) To 'forbid and punish' the use of such commerce as an agency to promote immorality dishonesty, or the spread of any evil or harm to the people of the States from the State of origin e.g. the kidnapping of persons of one State into another transmission of stolen cars, transportation of woman for immoral purposes

(2) To exclude from inter State trade or commerce harmful substances e.g., impure goods lottery tickets, carrying of liquor in a public carriage for the use of the passengers animals or persons having contagious diseases

(3) To prohibit entry into particular areas on military grounds.⁴

Article 303 provides that excepting a law required to meet a situation arising from scarcity of goods any law made by Parliament under Article 302 and by virtue of any Entry relating to trade and commerce in any of the Legislative Lists must be subject to one limitation viz. that it must not give any preference or make any discrimination as between one State and another.

Notwithstanding the imperative need that inter State trade and commerce should be free from restriction imposed by the States, it has been acknowledged in all countries that some local control is also necessary in order to safeguard the particular interests of each State without, of course, unduly burdening the freedom of inter State commerce or discriminating against other States. Article 304 empowers the State Legislature

(1) to impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject so however as not to discriminate between goods so imported

² *New South Wales v Commonwealth* (1915) 20 CLR 54

³ *Bede v Barrett* (1953) 344 US 583

⁴ *Gopalan v State of Madras* (1950) S.C.J. 174 (1950) SCR 88 (1950) 2 MLJ 42 AIR 1950 SC 27

and goods so manufactured or produced and

(2) to impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest.

Article 304 thus follows the American decision⁵, viz., that a State may tax goods imported from other States only if it taxes like domestic goods, and no discrimination is made against the imported goods by such tax. In the words of the Supreme Court of India—

“By Article 304, the principle of freedom of inter-State trade and commerce declared by Article 301 is subordinated to the State power of taxing goods imported from sister States provided only no discrimination is made in favour of similar goods of local origin. Thus, the States in India have full power of imposing what in American State legislation is called the ‘Use Tax’ gross receipt tax etc., subject only to the condition that such tax is imposed on all goods of the same kind produced or manufactured in the taxing State, although such taxation is undoubtedly calculated to fetter inter-State trade and commerce.”⁶

Parliament and State Legislatures can enact laws providing for the carrying on by the State or by a corporation owned or controlled by the State of any trade business or industry or service to the exclusion, complete or partial, of citizens or otherwise notwithstanding Article 301.⁷

The Supreme Court of India in its anxiety to safeguard freedom of trade has observed in the *Atiabari case*⁸:

“The doctrine of the freedom of trade, commerce and intercourse enunciated by Article 301 is not subject to the other provisions of the Constitution but is made subject only to the other provisions of Part XIII; that means that once the width and amplitude of the freedom enshrined in Article 301 are determined they cannot be controlled by any provision outside Part XIII.”

It is submitted that this view is incorrect. Trade is dealt with not only in Article 301 but also in Article 19 (1) (g). Article 19 (1) (g) guarantees to every citizen the right to carry on any trade or business. Trade cannot be carried on without goods or property and the right to acquire, hold and dispose of property is guaranteed by Article 19 (1) (f).

A non-discriminatory tax is not considered a restriction on the freedom of internal trade. Article 304 (a) affirmatively permits taxes to be levied on goods but negatively prevents such taxes being discriminatory against outside goods. Passenger tax is not violative of Article 301.⁹

As regards imposition of income-tax, in *Ujjam Bai v. State of Uttar Pradesh*¹⁰, the Supreme Court observed :—

“If the imposition of sales tax is a restriction on the carrying on of business then the imposition of income-tax must be that even to a greater degree. Likewise land tax must be held to be restriction on the right of a citizen to hold property guaranteed by Article 19 (1) (g). Indeed it will be impossible to conceive of any taxation which will not be a restriction under Article 19 (1) (f) or Article 19 (1) (g) ”

5. *Turner v Maryland*, 107 U.S. 38.

6. *State of Bombay v. United Motors*, (1953) S.C.J. 373 : (1953) S.C.R. 1069 : (1953) 1 M.L.J. 743 : A.I.R. 1953 S.C. 252.

7. Amended Article 305.

8. (1961) 1 S.C.R. 809 : A.I.R. 1961 S.C. 232.

9. *Sainik Motors v. State of Rajasthan*, (1962) 1 S.C.R. 517 : (1963) 1 S.C.J. 292 : A.I.R. 1961 S.C. 1480.

10. (1963) 1 S.C.R. 778 : A.I.R. 1962 S.C. 1621.

If it is to be held that taxation laws are within Article 19 (1) (g), then the question whether they are reasonable or not becomes justiciable. How is the Court to judge whether they are so or not? Can the Court say that the taxation is excessive and is unreasonable? What are the materials on which the matter could be decided and what are the criteria on which the decision thereon could be reached? It would, therefore, seem that the reasonableness of taxation laws is not a matter which is justiciable and therefore they could not fall within the purview of Articles 19 (5) and (6).

III

Article 19 (1) (c) guarantees freedom of association. It is not merely for political purposes that freedom of association is essential for democracy. It is essential for the maintenance of other rights guaranteed to the individual by the Constitution or the law. *Prima facie*, the right to form association is the greatest bulwark against power in any form. Where a single voice cannot make itself heard, that of the multitude certainly can. In the words of Lord Denning¹¹

"If men are ever to be able to break the bonds of oppression or servitude they must be free to meet and discuss their grievances, and to work out in unison a plan of action to set things right."

The importance of the freedom of association in a modern society can be assessed only if we take into account the part which associations can play. 'The association and cooperation of human beings in voluntary groups is one of the most important facts of social development. As life becomes more highly organised and complex, the groups formed by men and women associating freely for particular

purposes increase in number, size, power and diversity.

Taken in the aggregate, the voluntary associations, with membership rolls running into many millions and a huge accumulation of property, presents a formidable array of power, and their activities extend into almost every field of human activity economic professional, religious, educational, political, scientific, athletic, artistic, social and one knows not what else"¹²

The freedom of association includes the right to form a trade union with the object of *collective bargaining*¹³. It has, however, been held that the constitutional freedom of association does not include any fundamental right to strike¹⁴. In the result, the validity of a law penalising a strike in an essential service cannot be tested with reference to clause (4) of Article 19¹⁵. A similar view has been taken as regards the validity of a law declaring illegal a strike in a particular industry¹⁶. In many industries multi employer bargaining might be a vital factor in the effectuation of the policy of promoting labour peace through strengthened collective bargaining. In the U.S.A., it has been held that where, during contract negotiations between a labour union and an employers association, the union struck and picketed the plant of one of the employers belonging to the association, it was lawful for the other members of the association to resort to a temporary lock out in defence of their interest in

12 Robson *Justice and Administrative Law* (3rd Edn) pp 317-320

13 *Swadesi Industries v Workmen* AIR 1960 SC 1258

14 *All India Bank Employers Association v National Industries Tribunal* (1962) 3 SCR 269 AIR 1962 SC 171

15 *Radhey Shyam v Post Master General* (1965) 2 SCJ 581 (1964) 7 SCR. 403 AIR 1965 SC 311

16 *Mill Manager v Dharamdass* AIR. 1958 SC 311

11 Denning *Road to Justice* (1955) p 98

bargaining on a group basis.¹⁷ In England trade unions of, and collective bargaining by employers is legal since the Trade Union Act, 1871, as it is in the case of employees. The position is the same in India. Sections 23 and 25 of the Industrial Disputes Act, 1947 have also placed strikes and lock-outs on the same footing.

With the advent of welfare states the role of Government in industrial disputes has changed from that of a passive regulator to an active intervener.¹⁸ This is a significant contribution of the Constitution in augmenting conducive business environment in India.

IV

A significant phenomenon of the large scale economic and social planning in India has been the State regulation and control of private business, trade and industry. The operation of judicial process and its policy perspectives in this area, where law and policy blend has to be studied with specific reference to Article 19 (1) (g) read with Article 19 (6). Article 19 (6) permits the State to impose "reasonable restrictions" on the right to carry on any trade or business "in the interests of the general public."

The first noteworthy case involving the permissible scope of the power of the Government to regulate trade was *Chintaman Rao v. State of Madhya Pradesh*.¹⁹ The question was whether the total prohibition imposed by a State order on the business of manufacture of bidis during the agricultural season amounted to a reasonable restriction on the fundamental right to carry on trade guaranteed under Article 19 (1) (g) of the Constitution. The Supreme Court laid

down that the restriction should have a reasonable relation to the object in view and that it should not be "arbitrary" or excessive beyond the requirements of the interests of the public. Legislation which does not strike a harmonious balance between the individual's freedom under Article 19 (1) (g) and the social control permitted by Article 19(6) is unreasonable. Similar were the principles laid down in *Dwarka Prasad v. State of Uttar Pradesh*,²⁰ and *State of Rajasthan v. Nathmal*.²¹

These cases typify a judicial attitude which would not brook State control of private trade greater than what the exigencies of a particular situation warranted. They also laid down the proposition that administrative authorities must not be vested with unqualified discretionary powers without standards and procedural safeguards. The aftermath of these decisions reveals a shift in judicial thinking. The test of reasonableness has become more flexible and less demanding and the trend generally shows a judicial deference to legislative and executive action in construing the reasonableness of restrictions under Article 19 (6). In *Union of India v. Bhana Mal Gulzarimal*²², clause 11-B of the Iron and Steel (Control of Production and Distribution) Order, 1941, authorised the Controller to fix the maximum price for the sale of iron by a producer, stockholder or by any other person. Such prices could vary depending on the different sources from which iron and steel were obtained. The order was challenged on the basis of excessive delegation of powers to the Controller. The Court sustained the Order holding that the Controller's discretion was not arbitrary or unguided.

17. *Labour Board v. Truck Drivers Union*, (1956) 353 U.S. 87.

18. Charles A. Mayers : *Industrial Relations in India* (1960), pp. 241-245.

19. 1950 S.C.J. 571 : (1950) S.C.R. 759 ; A.I.R. 1951 S.C. 118.

20. 1954 S.C.J. 238 : (1954) S.C.R. 803 ; A.I.R. 1954 S.C. 224.

21. 1954 S.C.J. 404 : (1954) S.C.R. 982 ; A.I.R. 1954 S.C. 307.

22. 1960 S.C.J. 534 : (1960) M.L.J. (Cri.) 349 : A.I.R. 1960 S.C. 475.

In *Lord Krishna Sugar Mills v Union of India*²³, the petitioner challenged the constitutionality of the Sugar Export Promotion Act, 1958 which empowered the Central Government to make compulsory purchases of sugar for export. Export quotas were allotted to each sugar mill on a proportionate basis of production. The petitioner contended that the Act was void under Article 19 (6). The Supreme Court upheld it. It was observed

'The foreign export served the national interest by stabilising the sugar market so that the production of sugarcane may be maintained at a reasonable level. It also stabilised national economy by earning foreign exchange loss was so small as not to amount to an unreasonable restriction.'

Similar rationale based on the overall economic situation in the country was responsible for the Court's decision in the case of *Glass Chatons Importers and Users v Union of India*²⁴. It involved the Constitutional validity of clause 6 (h) of the Imports (Control) Order, 1955, which canalized the imports of glass chatons through the State Trading Corporation. Consequently, the petitioners were denied licences to import glass chatons. Rejecting such canalization of imports as an unreasonable restriction on the right to trade, the Court said

"... when the Government decides in respect of any particular commodity that its import should be by a selected channel, the Court would proceed on the assumption that the decision is in the interests of the general public unless the contrary is clearly shown."

The powers of the State to create monopolies in any trade, business industry or service is another restriction on the citizens' right to trade. In *Motilal v State of Uttar Pradesh*²⁵, the Allahabad High Court held the monopoly of transport in favour of the Government Roadways as unconstitutional as it totally deprived citizens of their rights under Article 19 (1) (g). The Constitution was amended and the Constitution (First Amendment) Act 1951 provided that a law relating to State monopoly need not satisfy the test of reasonableness.

Litigation under Articles 19 (1) (g) and 19 (6) has mostly involved the Essential Commodities Act 1955 and other allied economic development legislation designed primarily to promote the economic development of the country. Except for the brief spell of the early 1950s when the Court was exercising a rigorous control over the State's attempt to regulate private trade in general, the Court has upheld legislation and orders thereunder designed to regulate prices and use of essential commodities, freezing and requisitioning of stocks, import and export trade etc. The concept of "reasonableness" has undergone a transformation in tune with the prevalent economic conditions. This change brings to the light the Court's awareness of the necessity and wisdom of legislative and administrative action to deal with the pressing problems of economic development such as foreign exchange shortage, food scarcity and rising prices of essential commodities. The Court's judgments have justified and rationalised the State regulation of private trade. The operation of judicial process in this area has been considerably affected by the concept of welfare state.

It would seem to be clear that private economic interests do not enjoy much of substantive protection under the Consti-

²³ (1960) 1 S.C.R. 39 1960 S.C.J. 1119
A.I.R. 1959 SC 1124

²⁴ (1962) 2 S.C.J. 213 (1962) 1 S.C.R. 862
A.I.R. 1961 SC 1514

tution. The Court has been reluctant to interfere with the legislative and administrative action in this area. It is submitted that the Courts must ensure that the cherished values of our democratic society such as principles of rule of law and justice, are not lost sight of in the present era of welfare state with the inevitable increase in the governmental regulation of private enterprises.

V

“Property” : At the mention of the word, according to an old Indian saying, even a corpse will sit up on its pier. Although the Constitution assures the right to property under Article 31 (1) in these words : “No person shall be deprived of his property save by authority of law”, a conflict between established property owners on the one hand and nation-minded Government planners and officials, the architects of social change, on the other has marked the first twenty years of independence¹.

The Congress Party was committed to large scale agrarian reforms. It intended to abolish the Zamindaris and other proprietary estates and tenures so as to eliminate intermediaries between the tiller of the soil and the State. To achieve this aim most of the States passed Zamindari Abolition Acts. Validity of Bihar Zamindari Abolition Act was successfully challenged in *Kameshwar Singh v. State of Bihar*². In order to place these land reform laws above challenge in the Courts, Article 31-A was added to the Constitution by the First Amendment in 1951, which laid down that no law providing for the acquisition by the State of any estate or of any rights therein would be void on

the ground of its inconsistency with any fundamental rights.

In *Bela Banerjee's case*³ the Supreme Court held that compensation means market value of the property. The Fourth Amendment of the Constitution imposed an important limitation on judicial review. The revised Article 31 (2) provided “ no such law shall be called in question in any Court on the ground that the compensation provided by law is not adequate.”

A new clause 31 (2-A) was also added : “Where a law does not provide for the transfer of ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property”. This Amendment overrode the Supreme Court's decision in *Subodh Gopal's case*⁴. In *Kunthikoman v. State of Kerala*⁵, the Supreme Court held that ‘ryots’ were not included in the term “estate”. Pat came the Government's reply in the form of the Seventeenth Amendment Act which now provided that it was so included. The Supreme Court upheld the Seventeenth Amendment⁶, but in *Golak Nath's case*⁷ reversing its earlier unanimous decision it held that Parliament was not competent to amend the fundamental rights. The decision was given by 6 : 5 majority.

3. 1954 S.C.J. 95 : (1954) S.C.R. 558 : (1954) 1 M.L.J. 162 : A.I.R. 1954 S.C. 170.

4. 1954 S.C.J. 175 : (1954) S.C.R. 674 : (1954) 1 M.L.J. 355 : A.I.R. 1954 S.C. 119.

5. (1962) 1 S.C.J. 510 : (1962) 1 An.W.R. (S.C.) 213 : (1962) 1 M.L.J. (S.C.) 213 : A.I.R. 1962 S.C. 723.

6. *Sajjan Singh v. State of Rajasthan*, (1965) 1 M.L.J. (S.C.) 57 : (1965) 1 S.C.J. 377 : (1965) 1 An.W.R. (S.C.) 57 : (1965) 1 S.C.R. 933 : A.I.R. 1965 S.C. 845.

7. (1967) 2 S.C.J. 486 : (1967) 2 S.C.R. 762 : A.I.R. 1967 S.C. 1643.

1. H. C. L. Merillat: Land and the Constitution in India, 1970 p. 1.

2. A.I.R. 1951 Pat. 90, later *State of Bihar v. Kameshwar*, 1952 S.C.J. 354 : (1952) S.C.R. 889 : A.I.R. 1952 S.C. 252.

In this case, the Supreme Court has gone far towards over emphasising the fundamentalness of the right to property and removing all restraints that can be put upon it even under the permissible limits of the Constitution for example through an amendment of the Constitution. There is danger that if the Court does not temper its doctrinaire logic with practical wisdom it will convert the fundamental rights into a suicide pact.

passed by Parliament, will have remain to be seen. If Parliament appropriate private property for only nominal compensation, the spectre of confiscation would be casting its ugly shadows on all private property. It can now be just compensation or confiscation depending wholly on the mood of Parliament, with judiciary as a helpless onlooker.

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The cumulative effect of the first fourth and seventeenth amendments was that the State can acquire private property for public purposes on payment of compensation adequacy of which could not be questioned in the Court. But the Supreme Court, in *Vajravelu*⁸ and in the recent Bank Nationalisation case held that the Court however could see whether the compensation provided was 'illusory' and if so it could declare the law of acquisition as bad.

[END OF VOLUME (1971) 2 S C J
(JOURNAL)]

To nullify the effect of these and *Golak Nath*⁹ decisions two Acts have been passed. The first of these—Twenty-fourth amendment of the Constitution restores Parliament's power of amending the fundamental rights by suitably amending Articles 13 and 368. The Twenty fifth amendment removes completely the subject of compensation from justiciability¹⁰. There will be no review of the reasonableness of the amount of compensation. What effect these amendments,

8 *Vajravelu Mudaliar v Special Deputy Collector West Madras* (1964) 2 S C J 703 (1964) 2 M L J (S C) 173 (1964) 2 A n W.R. (S C) 173 A I R 1965 S C 1017

9 (1967) 2 S C J 486 (1967) 2 S C R. 762 A I R. 1967 S C 1643

10 Privy purses and the concept of rulership are to be abolished by the Constitution (Twenty sixth Amendment) Bill as they are "incompatible with an egalitarian social order" (*Hindustan Times*, dated 7th August 1971)

[S.C. N.O. 44.]

K. S. Hegde and A. N. Grover, JJ. **Delhi Cloth & General Mills Co. v. Commr. of Sales Tax.**

28—7—1971. C.As. Nos. 1272 and 1273 of 1967 and 2453 of 1968.

Madhya Pradesh General Sales Tax Act (II of 1958), sections 2 (o) and 4—Tax collected by dealer from purchaser—If part of “sale price” within section 2 (o)—If liable to be included in taxable turnover.

When a dealer under the Madhya Pradesh General Sale Tax Act, 1958, passes on his tax liability to the buyer, the amount recovered by the dealer from the purchaser is really part of the entire consideration paid by the buyer and therefore the same will have to be taken into consideration in computing its taxable turnover.

Under section 4 of the Madhya Pradesh General Sales Tax Act, 1958, the liability to pay tax is that of the dealer. The purchaser has no liability to pay tax. There is no provision in the Act from which it can be gathered that the Act imposes any liability on the purchaser to pay the tax imposed on the dealer. If the dealer passes on his tax burden to his purchasers he can only do it by adding the tax in question to the price of the goods sold. In that event the price fixed for the goods including the tax payable becomes the valuable consideration given by the purchasers for the goods purchased by him. If that be so, the tax collected by the dealer from his purchasers becomes a part of the sale price fixed, as defined in section 2 (o). So long as there is no law empowering the dealer to collect tax from his buyer or seller, there is no legal basis for saying that the dealer is entitled to collect the tax payable by him from his buyer or seller. Whatever collection that may be made by the dealer from his customers the same can only be considered as valuable consideration for the goods sold.

Deputy Commissioner of Commercial Taxes v. M. Krishnaswamy Mudaliar, 5 S.T.C. 88, Distinguished.

V.K. ——— Appeals dismissed.

S—NRC

[S.C. N. C. 45.]

K. S. Hegde and A. N. Grover, JJ. **Deputy Transport Commissioner v. Anand Transport Co. (P.) Ltd.**

29—7—1971. C A. Nos. 1449 to 1454 of 1967.

Madhya Pradesh Motor Vehicles (Taxation of Passengers) Act (1959), sections 5, 6 and 7—Return submitted by operator of stage carriage under section 5 accepted by Tax Officer—Tax not paid—Tax officer if bound to make an order under section 7 quantifying amount of tax before issuing notice of demand.

The High Court was of the view that even where returns had been filed and accepted as correct the Tax Officer has to pass a proper assessment order holding the operator liable for payment of tax in accordance with the return submitted by him. In other words, according to it, no notice of demand can be issued until the Tax Officer makes such an order quantifying the amount of tax. The contention which prevailed with the High Court cannot be accepted. Section 7 of the Act rules out any such course to be followed by the Tax Officer. It is only when the returns have not been submitted or when returns submitted are found to be incorrect and incomplete that the Tax Officer has to make an enquiry and determine the sum payable by the operator by way of tax. Similarly if there has been escapement of tax, proceedings have to be taken under section 8 and an order has to be made after an enquiry. The position would be the same if penalty is sought to be levied under section 9. But where returns have been accepted as correct nothing more need be done except to recover the tax due which has not been paid and no assessment order need be passed in view of the express language of section 7.

V.K. ——— Order accordingly.

[S C N C 46]

K S Hegde and
A N Grover, JJState of U P v
Murari Lal and
Brothers Ltd

3-8-1971 C A No 15 of 1968

Contract Act (IX of 1872), sections 230 (3) and 235—Constitution of India (1950), Article 299 (1)—Contract not complying with Article 299 (1)—If void—Applicability of sections 230 (3) and 235 of Contract Act

The consensus of Judicial opinion is that a contract entered into without complying with the conditions laid down in Article 299 (1) of the Constitution is void. If there is no contract in the eye of the law it is difficult to see how section 230 (3) of the Contract would become applicable to such a case.

Query Section 235 of Contract Act whether can be applied to cases where the contract suffers from the infirmity that the requirements of Article 299 (1) of the Constitution have not been complied with?

V.K. ——— Appeal allowed

[S C N C 47]

K S Hegde and
A N Grover, JJCommissioner of Wealth tax,
Bombay v
Consolidated Pneumatic
Tools Co., Ltd27-7-1971 C As Nos 1879 to 1881
of 1967

Wealth tax Act (XXVII of 1957) section 6 (i)—Non resident company—Computation of net-wealth—Goods on High Seas in transit to India—Whether includible—Appeal brought Special Leave—Discretion of Court

The assessee was a non resident company. During the relevant valuation dates some goods belonging to the assessee were on the High Seas. The question for decision in the appeals by Special Leave was whether the goods in transit from England to India belonging to the non resident assessee could be considered as wealth of the assessee during the relevant valuation dates.

Held Scope of section 6 of the Wealth tax Act is clear and unambiguous. Quite that the High Seas cannot be considered as a part of India in the absence of anything in the Act making it a part of

India. Therefore the goods on High Seas in transit to India were located outside India on the relevant valuation dates and the value of those goods cannot be taken into consideration in computing the net wealth of the assessee.

In an appeal by Special Leave the Supreme Court has a discretion to grant or refuse to grant relief.

T K K

Appeals dismissed

[S C N C 48]

K S Hegde and
A N Grover JJCommissioner of Income-tax
West Bengal v
Balakrishna Malhotra

28-7-1971 C A No 1391 of 1967
Income-tax Act (XI of 1922), section 34 (3) proviso — Reassessment — Limitation — Notice of reassessment—Income computed within one year from date of notice but tax determined and demand notice issued after expiry of one year—Validity of reassessment—Interpretation of Statutes—Provision in a taxing statute—*Stare decisis*

The original assessment of the assessee for the assessment year 1944-45 was made sometime before 13th March, 1953. Subsequently after obtaining the sanction of the Commissioner of Income tax, the Income tax Officer reopened the assessment under section 34 (1) (e) of the Act. On 13th March, 1953 he issued a notice to the assessee under section 34 read with section 22 (2) of the Act. After considering the objection of the assessee, the Income-tax Officer computed the income of the assessee under section 34 read with section 23 (4) on 8th March 1954 at Rs 60,000. But on that date the Income tax Officer did not determine the tax due from the assessee. He determined the tax due from the assessee and issued a notice under section 28 (3) in Form 30 only on 31st March, 1954. The assessee contended that the assessment was barred under section 34 (3). That contention was rejected by the authorities under the Act including the Appellate Tribunal but the High Court answered the reference in favour of the assessee. On appeal to Supreme Court,

Held As long back as 24th September 1953, the High Court of Madras in *Viswanathan Ghetiar's case*, (1954) 25 I T R 79 came to the conclusion that the

word "assessment" in proviso to section 34 (3) means not merely the computation of the income of the assessee but also the determination of the tax payable by him. No other High Court has taken a contrary view. The Revenue must have in all these years acted on the basis of that decision of the Madras High Court. Interpretation of a provision in a taxing statute rendered years back and accepted and acted upon by the department should not be easily departed from. It may be that another view of the law is possible but law is not a mere mental exercise. The Courts while reconsidering the decisions rendered long time back particularly under taxing statutes cannot ignore the harm that is likely to happen by unsettling law that had been once settled. The corresponding provisions of the 1961 Act are materially different from the provisions of the 1922 Act. Under these circumstances there was no justification in departing from the interpretation placed by the Madras High Court in *Viswanathan Ghetiar's case*, (1954) 25 I.T.R. 79, though a different view of the law may be reasonably possible.

T.K.K.

Appeal dismissed.

[S.C. N.C. 49.]

*K. S. Hegde and
A. N. Grover, JJ.*

**Dalmia Jain & Co., Ltd. v.
Commissioner of Income-tax,
Bihar and Orissa.**

29—7—1971. C.A. No. 1812 of 1967.

Income-tax Act (XI of 1922), section 10 (2) (xv)—Capital expenditure or revenue expenditure—Tests—Assessee appointed as agent of Government for working limestone quarry—Third party filing suit against Government and assessee for specific performance of earlier agreement for lease or damages in the alternative—Expenditure incurred by assessee in defending suit—Whether allowable.

The Government of the State of Bihar appointed the assessee (appellant) as the agent of the Government for working the quarry with an understanding that the Murli Hills will be leased out to the assessee if the Government succeeds in the dispute

between the Kalyanpur Lime Company and the Government. When the assessee-company was in possession of the Murli Hills as an agent of the Government the Kalyanpur Lime Company filed a suit for specific performance of an earlier agreement to lease and /or in the alternative it claimed damages. In that suit the Kalyanpur Lime Company impleaded the State of Bihar as well as the assessee as defendants. That suit was resisted by the State Government as well as by the assessee. The Supreme Court granted a decree for damages against both the defendants. The assessee claimed that the litigation expenses incurred by it in defending the suit was deductible as business expenditure. The Income-tax Officer as well as the Appellate Assistant Commissioner came to the conclusion that the expenditure in question was incurred for the purpose of acquiring a new asset. The Tribunal came to the conclusion that the expenditure in question was incurred to protect the business of the assessee. On the other hand, the High Court agreed with the view taken by the Income-tax Officer and the Appellate Assistant Commissioner. On appeal to the Supreme Court,

Held, that the litigation expenses constituted expenditure laid out wholly and exclusively for the purpose of the assessee's business.

Where the expenditure laid out for the acquisition or improvement of a fixed capital asset is attributable to capital, it is capital expenditure but if it is incurred to protect the trade or business of the assessee then it is a revenue expenditure. In deciding whether a particular expenditure is capital or revenue in nature, what the Courts have to see is whether the expenditure in question was incurred to create any new asset or was incurred for maintaining the business of the company. If it is the former it is the capital expenditure; if it is the latter, it is the revenue expenditure.

The assessee resisted the suit in order to protect its business as opined by the Tribunal and not with a view to safeguard its prospect of getting a new lease. It did not initiate the proceeding. It merely defended the claim made against it. The claim was made against it because it was

working the Murli Hills though as an agent of the Government. Therefore the civil proceedings were launched against it because of one of its business activities. Therefore the expenditure in question was a revenue expenditure.

TKK

Appeal allowed

[SC NO 50]

H S Hegde and
A N Grover, JJ

Commissioner of Wealth-tax,
Bihar and Orissa v
Kripashankar
Dayashanker Worah

29-7-1971 C A Nos 1478 to 1481
of 1967

(A) Wealth-tax Act, 1957 (Central Act XXVII of 1957), section 21—Trust—Settlor himself trustee under trust deed—Provision for maintenance of settlor, his wife, for maintenance, education, marriage expenses of minor daughters for maintenance and education of minor sons provision for residence free of rent in part of trust property—Vested interest to sons after the death of settlor and his wife—Settlor and his wife alive on valuation date—Assessee whether assessable to wealth tax as trustee in respect of trust properties

(B) Interpretation of Statute—Taxing provision—Rule of strict construction—Scope of

The respondent by means of a deed of trust transferred certain immovable properties and shares unto himself as the trustee for making provision for the maintenance of himself, his wife for the maintenance, education and the marriage expenses of his unmarried daughters and for the maintenance and education expenses of his minor sons. Certain provisions were made in the event of the settlor predeceasing his wife. After the marriage of the daughters and also after the death of the settlor's wife and the attainment of majority of both the minor sons, the trustee was to hold the Trust Estate for the absolute use and benefit of the two sons. The intention of the settlor being the subject to the trust thereby created the two minor

sons would take a vested interest in the trust estate. Provision was made for the residence of the settlor, his wife and the minor children free of rent in a part of the trust properties. Even before the first of the relevant valuation dates the sons had attained majority and the daughters had been married. The settlor and his wife were alive on the valuation dates. The respondent was assessed to wealth tax as trustee in respect of the trust properties under section 21 of the Act. The High Court on reference, held that section 21 (1) was inapplicable. On appeal to the Supreme Court,

Held, that the assessee was assessable to wealth tax as trustee in respect of the trust properties under section 21 of the Act.

The conception that the trustee is holding the trust property on behalf of others may not be in conformity with the legal position as contemplated by the Trust Act but the Legislature is competent in the absence of any restrictions placed on it by the Constitution to give its own meaning to the words used by it in a statute. There can be hardly any doubt that the Parliament while enacting section 21 (2) of the Act proceeded on the basis that for the purpose of the Act the trustee is holding the trust property on behalf of the beneficiaries. The mere fact that this conception does not accord with the provisions of the Trust Act does not invalidate section 21 (1). Section 21 (1) specifically takes in the trustees.

The words "on behalf of" used in section 21 (1) of the Act are synonymous with the expression "for the benefit of". Notwithstanding that the trustees hold property for the benefit of beneficiaries and not on their behalf, section 21 (1) applies to them and they are liable to wealth tax only in the like manner and to the extent as it would be leviable upon and recoverable from any such beneficiary.

It is true that a taxing provision must receive a strict construction at the hands of the Courts and if there is any ambiguity, the benefit of that ambiguity must go to the assessee. But that is not the same thing as saying that a taxing provision should not receive a reasonable construction. If the intention of the Legislature is clear and beyond doubt then the fact that the provision could have been more

artistically drafted cannot be a ground to treat any part of a provision as otiose. So long as the intention of the Legislature is clear and beyond doubt, the Courts have to carry out that intention.

T.K.K.

Appeals allowed.

[S.C. N.C. 51.]

K. S. Hegde and A. N. Grover, JJ. Commissioner of Income-tax, Gujarat v. Kurban Hussain Ibrahimji Mithiborwala.

C.A. No. 1990 of 1968 and
C.A. No. 1172 of 1971.

Income-tax Act (XI of 1922), section 34—Back assessment—Officer—Jurisdiction—Issuance of a valid notice necessary—Invalid notice renders proceedings void—Notice of back assessment for a particular assessment year—Reassessment for a different year—Proceedings invalid.

While the Income-tax Officer sought to reopen the assessment of the assessee for the assessment year 1947-48 but in fact he reopened the assessment of the year 1948-49, the High Court in reference held differing from the conclusion of the Tribunal, that notice of back assessment was invalid. Hence the appeal by the Revenue,

Held: The High Court was right in holding that the notice was invalid and as such the Officer had no jurisdiction to revise the assessment of the assessee for the year 1948-49.

It is well settled that the Income-tax Officer's jurisdiction to reopen an assessment under section 34 depends upon the issuance of a valid notice. If the notice issued by him is invalid for any reason the entire proceedings taken by him would become void for want of jurisdiction.

On facts: In the circumstances of the case the notice of reassessment was invalid.

V.S.

Appeals dismissed.

[S.C. N.C. 52.]

K. S. Hegde and A. N. Grover, JJ. The Commissioner of Income-tax, West Bengal II, Calcutta v. M/s. Electro House.

2—9—1971.

C.As. Nos. 2376 to 2379 of 1968 and

C.As. Nos. 1168 to 1171 of 1971.

Income-tax Act (XI of 1922), sections 33-B, 34—Commissioner—Powers of revision—Jurisdiction—Notice to assessee not a condition precedent—Notice—Principle of natural justice—Absence of notice—May affect legality of order but not the jurisdiction—Notice for back assessment—Contrast.

The Commissioner of Income-tax, on finding from the records that the orders of the Officer granting registration to the assessee for one year and the renewal thereof for the next year, were erroneous and prejudicial to the Revenue, proceeded against the assessee under section 33-B of the Act by issuing a notice intimating the proposal to cancel the orders and giving the assessee an opportunity to submit his objections. The Tribunal held that the notice issued, was not one required to be issued by the Act and hence its validity or invalidity did not affect the jurisdiction of the Commissioner. But the High Court in reference held that the notice issued was not valid and therefore the Commissioner had no jurisdiction to proceed with the enquiry. Hence the appeal by the Revenue.

Held, the notice issued did not contravene section 33-B and the Commissioner validly exercised his jurisdiction under the section.

Section 33-B unlike section 34 of the Act does not prescribe any notice to be given. A notice under section 34 is a condition precedent for the assumption of jurisdiction under that section. The jurisdiction of the Commissioner to proceed under section 33-B is not dependent on the fulfilment of any condition precedent. It only requires the Commissioner to give an opportunity to the assessee of being heard before passing an order under section 33-B. The necessity to give a

notice pertain to observance of principles of natural justice Breach of the principle of natural justice may affect the legality of the order made but that does not affect the jurisdiction of the Commissioner

Gita Devi Aggarwal v Commissioner of Income tax West Bengal and others, (1970) 76 I T R 496

V S Order accordingly

[S C N C 53]

K S Hegde and A N Grover, JJ Commissioner of Income-tax, West Bengal v Hind Construction Ltd

6—9—1971 C A No 1287 of 1971 and C A No 2001 of 1968

Income-tax Act (XI of 1922)—Income—Profits of sale—No question of sale to self—Machinery got by assessee—Inflated value shown in the accounts—Assessee forming a partnership with another—Transfer of machinery to firm as investment—Again shown at a further inflated value—No element of sale involved—No question of profits

The assessee got machinery of the value of about Rs 2 lakhs. In the accounts of the assessee for 1949-50 the value was written up by Rs 4 lakhs an equivalent sum having been credited to a Capital Reserve Account. The assessee and another formed a partnership with equal shares and the assessee transferred the value of his machinery to the firm again at a further inflated value (about Rs 6 lakhs) as their investment. On the question whether the sum of Rs 4 lakhs was a profit on the sale of machinery, the Tribunal and the High Court held that it was not a sale at all. Hence the appeal by the Revenue.

Held A sale contemplates a seller and a purchaser. No one can sell his goods to himself. If a person revalues his goods and shows a higher value for them in his books, he cannot be considered as having sold the goods and made profits therefrom. Nor can a person by handing over his goods to a partnership of which he is a partner and that as his share of capital can be considered as having sold the goods to the partnership.

On facts The Tribunal found that there was no sale either at the time when the assessee inflated the price of the machinery which fell to its share at the time of the division or at the time when the new partnership was created. The finding has to be upheld.

Commissioner of Income tax v Sir Hony Melita's Executors, (1955) 28 I T R 928 58 Bom L R 112 I L R (1956) Bom 154 A I R 1956 Bom 415

V S Appeals dismissed

[S C N C 54]

J M Shelat I D Dua and S C Roy JJ Darshan Singh Ram Kishan v State of Maharashtra Cr A No 100 of 1969

Criminal Procedure Code (V of 1898) section 196 A (2)—Scope—Charge-sheet filed by police before Magistrate alleging commission of offences under sections 419/109 471 and 468 of Indian Penal Code—But Magistrate while drawing up charges and passing order of committal altering the charge to one under sections 120-B and 467, Indian Penal Code—Section 196 A (2) if attracted

What section 196 A (2) prohibits is taking cognizance of an offence of criminal conspiracy unless consent to the initiation of proceedings against the person charged with it has been first obtained. Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint or on a police report, or upon information of a person other than a police officer. Therefore when a Magistrate takes cognizance of an offence upon a police report *prima facie* he does so of the offence or offences disclosed in such report.

In the instant case while drawing up the charges and passing his order of committal the Magistrate considered that though the charge sheet filed before him by the

police alleged the commission of offences under section 419/109, 471 and 468, the proper charge on the materials before him, although they were the same as before the police officer, warranted a charge of criminal conspiracy for forging a passport. It is quite clear, however, that the cognizance which he took was of the offences alleged in the charge-sheet because it was in respect of those offences that the police had applied to him to initiate proceedings against the accused and not for the offence under section 120-B, Indian Penal Code. It was at a later stage *i.e.*, at the time of passing the committal order that he considered that a charge under section 120-B, Indian Penal Code was the more appropriate charge and not a charge under section 109 of the Penal Code. That being so, it must be held that the Magistrate took cognizance of the offence of abetment of an offence of forgery and impersonation so far as the accused was concerned and not of the offence of criminal conspiracy and therefore section 196-A (2) did not apply.

V.K. ————— *Appeal dismissed*

[S C. N.C. 55]

K. S. Hegde and State of Madras v.
A. N. Grover, JJ. M/s. S.G. Jayaraj
Nadar & Sons.

16—9—1971. C.A. No. 1404 of 1969

Madras General Sales Tax Act (I of 1959), section 12 (3)—Penalty under—When may be imposed.

Sub-section (3) of section 12 empowers the assessing authority to levy the penalty only when it makes an assessment under sub-section (2) thereof. It is well known that the best judgment assessment has to be on an estimate which the assessing authority has to make not capriciously but on settled and recognised principles of justice. An element of guess work is bound to be present in best judgment assessment but it must have a reasonable nexus, to the available material and the circumstances of each case. Where account books are accepted along with other records there can be no ground for making a best judgment assessment.

In the present case the High Court found that the turnovers involved in the disputed

items were not determined on the basis of any estimate or best judgment. The quantum of turnovers in respect of these items were based on the assessee's account books. The true position was therefore that certain items which had not been included in the turnover shown in the returns filed by the assessee were discovered from his own account books and the assessing authority included those items in his total turnover. For these reasons the High Court was justified in holding that the assessment could not be regarded as based on best judgment. The penalty thus could not be believed in respect of these items.

V.K. ————— *Appeal dismissed*

[S C. N.C. 56]

G.A. Vaidialingam, M/s. Bharat Barred
P. Jaganmohan Reddy, JJ. & Drum Mfg.
Co., Ltd. v.
Employees State

Insurance Corporation.

23—9—1971. C.A. No. 563 of 1967.

Employees' State Insurance Act (XXXIV of 1948), section 96 (1) (b)—Rule 17 of Employees' State Insurance Rules framed by the Government of Bombay under—If *ultra vires* the rule making power of the State Government.

Rule 17 of the Employees' State Insurance Rules framed by the Government of Bombay is *ultra vires* the rule making power of the State Government under section 96 (1) (b) of the Employees State Insurance Act.

M/s. A. K. Brothers v. Employees' State Insurance Corporation, A.I.R. 1965 All. 410, Overruled; Employees' State Insurance Corporation v. Madhya Pradesh Government, A.I.R. 1964 M.P. 75; M/s. Seler Works v. Employees' State Insurance Corporation, A.I.R. 1964 Mad. 376; United India Timber Works v. Employees' State Insurance Corporation, A.I.R. 1967 Punj 166 (F.B.); Roshan Industries (P.) Ltd. v. Employees' State Insurance Corporation, A.I.R. 1968 Punj. 56 and Employees' State Insurance Corporation v. A. P. State Electricity Board, 1970 Lab. I.C. 921, Approved.

Apart from the implications inherent in the term 'procedure' appearing in section 96 (1) (b), the power to prescribe by rules

any matter falling within the ambit of the term must be the 'procedure to be followed in proceedings before such Court'. The word 'in' furnishes a clue to the controversy that the procedure must be in relation to proceedings in Court after it has taken sense of the matter which obviously it takes when moved by an application presented before it. If such be the meaning the application by which the Court is asked to adjudicate on a matter covered by section 75 (2) is outside the scope of the rule making power conferred on the Government.

That apart, the nature of the rule bars the claim itself and extinguishes the right which is not within the pale of procedure.

VK ————— Appeal dismissed

[SC NC 57]

K S Hegde and M/s Lalta Prasad
A N Grover, JJ Kham Lal v
Asst Commissioner of
Sales tax

6-10-1971 C.A No 2571 of 1969

U P Sales Tax Act (1948) section 9 (1) proviso and (6)—Appeal against order of assessment—Memorandum of appeal filed within time—Delay in making necessary deposit of admitted tax—Jurisdiction of appellate authority to condone

It is true that an appeal filed under section 9 of the U P Sales Tax Act cannot be entertained by the appellate authority unless satisfactory proof is adduced of the payment of tax admitted by the appellant to be due but in a case where the amount of admitted tax is deposited after the period of limitation has expired all that will happen is that the appeal will become entertainable only on the day on which satisfactory proof of payment of that amount is produced. In other words the appeal will be deemed to have been properly filed on the date on which the amount of admitted tax is paid. If that is beyond the period of 30 days the appeal will be barred by time. Section 9 (6) will immediately become applicable to that appeal and it will be open to the appellant to apply for condonation of delay under that provision. It is difficult to follow the argument that the deposit of the amount of admitted tax must be made within 30 days and that any delay

with regard thereto cannot be condoned though the delay in filing the appeal can be condoned under sub-section (6). A proper and correct reading of section 9 cannot justify such an approach. The correct approach is to treat the appeal as having been preferred in the date on which proof of payment of the tax was furnished and then to see whether under sub-section (6) of section 9 there was sufficient cause for excusing the delay in preferring the appeal.

Gangadharan Pillai v Sales Tax Officer,
16 S T C 578 and Raja of Venkatagiri v
Commissioner of Income tax, 28 I T R
188, Approved Lakshmiratan Engineering
Works Ltd v Assistant Commissioner of
Sales Tax, 21 S T C 154, distinguished

VK ————— Appeal allowed

[SC NC 58]

G A Vaidialingam, Khardem Ibocha
P Jagannohan Reddy and Singh v
K K Mathew JJ State of Manipur
8-10-1971 W.Ps. Nos 289 to 295
of 1971.

Constitution of India (1950) Article 22 (5)
—Orissa Preventive Detention Act (1970),
section 3 (2) —Detention under —Unex-
plained delay of 17 days in disposing of
representation of detenu—If vitiates order
of detention

An unexplained delay in disposing of the representation made by a detenu who is detained under a special law relating to preventive detention makes the order of detention illegal as being violative of the Constitutional right guaranteed to such a person under Article 22 (5) of the Constitution.

Case-law discussed

In the instant case there is an unexplained delay of 17 days between the date when the representation made by the petitioners who were detained under the Orissa Preventive Detention Act, 1970, was received by the Administrator, namely, 3rd March, 1971 and when the latter considered the representation and passed the order rejecting the same on 20th March, 1971. If that is so, without anything more, that circumstance by itself is a sufficient ground for holding that the orders of detention of the petitioners are illegal and they are entitled to be released.

VK ————— Petitions allowed

[S.C. N.C. 59.]

S. M. Sikri, C.J.

J. M. Shelat,

G. K. Mitter,

A. N. Ray,

I. D. Dua,

S. G. Roy and

D. G. Palekar, JJ.

Jagannath v.
Authorised Officer,
Land Reforms.

11—10—1971. C.As. Nos 247 to 257
etc., of 1967.

Madras Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961)—Constitutional validity—If beyond the competence of the State Legislature under Entry 18 in List II of the 7th Schedule to the Constitution of India.

The argument that the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961, having been struck down as invalid by the Supreme Court in *Krishnaswami Naidu v. State of Madras*, (1964) 7 S.C.R. 82, it was *non est* and was void *ab initio* and Article 31-B of the Constitution could not validate it without a separate validating Act being passed by the Madras Legislature, is untenable.

Apart from the question as to whether fundamental rights originally enshrined in the Constitution were subject to the amendatory process of Art. 368, it must now be held that Article 31-B and the Ninth Schedule of the Constitution have cured the defect, if any, in the various Acts mentioned in the said schedule as regards any unconstitutionality alleged on the ground of infringement of fundamental rights and by express words of Article 31-B such curing of the defect took place with retrospective operation from the dates on which the Acts were put on the statute book. These Acts even if void or inoperative at the time when they were enacted by reason of infringement of Article 13 (2) of the Constitution, assumed full force and vigour from the respective dates of their enactment after their inclusion in the Ninth Schedule read with Article 31-B of the Constitution. The States could not, at any time cure any defect arising from the violation of the provisions of Part III of the Constitution and therefore the objection that the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961, should have

been re-enacted by the Madras Legislature after the Seventeenth Constitutional Amendment came into force cannot be accepted.

The Act is also not incompetent for want of legislative power of the State. Entry 18 in List II of the Seventh Schedule to the Constitution like any other Entry in the three lists only gives the outline of the subject-matter of legislation and therefore the words in the entry are to be construed in their widest amplitude. The field of legislation covered by the entry is not to be narrowed down in any way unless there is anything in the entry itself which defines the limits thereof. Entry 18 in List II is meant to confer the widest powers on the State Legislature with regard to rights in or over land and such rights are not to be measured by or limited to the rights as between landlords and tenants or the collection of rents. The words which follow the expression "rights in or over land" are merely by way of illustration. The specification itself shows that the genus of the rights mentioned is not the one which landlords have *vis-a-vis* their tenants or *vice versa*. All kinds of legislation regarding transfers and alienations of agricultural land which affect the rights therein of landlords and tenants are envisaged by the entry as also improvement of land and colonisation of such land. If the State wants to enforce a measure of acquiring lands of people who hold areas over a certain ceiling limit so as to be able to distribute the same among the landless and other persons, to give effect to the directive principles in Article 39 (b) and (c) of the Constitution, it is not possible to say that the same would be outside the scope of Entry 18 in List II read with Entry 42 in List III. Such a measure can aptly be described as a measure of agrarian reform or land improvement in that persons who have only small holdings and work on the lands themselves would be more likely to put in greater efforts to make the land productive than those who held large blocks of land and are only interested in getting a return without much effort. The measure does not transgress the limits of the legislative field because it serves to remove the disparity in the ownership of land. Persons who lose the ownership of lands

in excess of the ceiling imposed are compensated for the lands acquired by the State and distributed among others. Acquisition of land would not directly be covered by Entry 18 but read with Entry 42 in List III the State has the competence to acquire surplus land so as to give effect to the policy in Article 39 of the Constitution

Case law discussed

V K ——— Appeals dismissed

[S C N C 60]

K S Hegde and M/s Sita Ram
H R Khanna JJ Bishambhar Dayal v
21-10-1971 State of U P

C.As Nos 362 and 1972 of 1969

U P Sales Tax Act (XV of 1948) section 3-D (1)—Validity—If suffers from the vice of excessive delegation—If hit by Art 14 of the Constitution

The contention that in empowering the Government to levy tax on goods other than foodgrains at a rate not exceeding 5 paise in a rupee the Legislature parted with one of its essential legislative functions and as such section 3 D (1) of the U P Sales Tax Act is *ultra vires* the powers of the State Legislature is untenable. It is true that the power to fix the rate of tax is a legislative power but if the Legislature lays down the legislative policy and provides the necessary guide lines that power can be delegated to the executive. Whether a power delegated by the Legislature to the executive has exceeded the permissible limits in a given case depends on its facts and circumstances. That question does not admit of any general rule. It depends upon the nature of the power delegated and purposes intended to be achieved. Taking into consideration the legislative practice in this country and the rate of tax levied or leviable under the various sales tax laws in force in this country, it cannot be said that the power delegated by section 3 D (1) to the executive is excessive.

Section 3 D (1) is also not hit by Article 14 of the Constitution of India. The power to levy tax includes within itself the power to provide against evasion of tax. A licensed dealer has to function according

to the conditions of his licence. Hence whenever a purchase is made through a licensed agent, the authorities have the opportunity to know what purchases have been made and from whom those purchases were made but that would not be the case when purchases are made through dealers who are not licensed. Hence if registered dealers are permitted to make purchases through dealers who are not licensed and those dealers themselves are not liable to be taxed then opportunity for evasion becomes larger. The rule of discrimination does not rule out classification. The power of classification under fiscal law is larger than in the case of other laws. Hence there was nothing wrong in the Legislature making a classification between licensed dealers and dealers who are not licensed.

V K ——— Appeals dismissed

[S C N C 61]

K S Hegde and Shamrao Vithal Co-
H R Khanna JJ operative Bank Ltd v
21-10-1971 Pandharanga Mallaya

C.A No 1312 of 1967

Multi Unit Co-operative Societies Act (1942), section 2 (1)—'Control'—Meaning of—Society registered in Bombay having branch office at Madras—Dispute regarding dealings with its member relating to Madras branch—Proper forum for adjudication of

The word 'control' in section 2 (1) of the Multi Unit Co-operative Societies Act does not comprehend within itself the adjudication of a claim made by a co-operative society against its members. The word 'control' is synonymous with superintendence management or authority to direct, restrict or regulate. Control is exercised by a superior authority in exercise of its supervisory power. Adjudication of disputes is a judicial or quasi-judicial function and it would be unduly straining the meaning of the word 'control' to hold that it also covers the adjudication of disputes between a co-operative society and its members. There is a clear distinction between jurisdiction to decide a dispute which is a judicial power and the exercise of control which is an administrative power and

it would be wrong to treat the two as identical or equate one with the other.

Hence a co-operative society registered in Bombay and having a branch office in Madras cannot have a dispute, in respect of transactions which took place in Madras relating to the Madras branch between itself and one of its members residing in Madras, adjudicated upon under section 54 of the Bombay Co-operative Societies Act, 1925. Such a dispute would have to be adjudicated upon under the relevant Madras Act. The fact that for the purpose of control the society was governed by the Bombay Act would not justify a departure from this rule

V.K. ——— *Appeal dismissed.*

[S.C N.C. 62.]

K. S. Hegde and Shashi Bhushan v.
H. R. Khanna, JJ. Balraj Madhok.
22—10—1971. C.As Nos. 1343 and 1473
of 1971.

Representation of the People Act (XLIII of 1951), section 92 (a)—Election petition—Inspection of ballot paper—When may be allowed.

In a matter like allowing inspection of ballot papers, no rigid rules have been laid down, nor can be laid down. Much depends on the facts of each case. The primary aim of the Courts is to render complete justice between the parties. Subject to that overriding consideration, Courts have laid down the circumstances that should weigh in granting or refusing inspection.

It is true that merely because someone makes bold and comes out with a separate allegation, that by itself should not be a ground to attach value to the allegation made. But at the same time serious allegations cannot be dismissed summarily merely because they do not look probable. Prudence requires a cautious approach in these matters. In all these matters, the Court's aim should be to render complete justice between the parties. Further, if the allegations made raise issues of public importance greater care and circumspection is necessary.

It is no doubt true that a judge while deciding the question of inspection of the ballot papers must bear in mind the impor-

tance of the secrecy of the ballot papers. The allegations in support of a prayer for inspection must not be vague or indefinite; they must be supported by material facts and prayer made must be a *bona fide* one. If these conditions are satisfied the Court will be justified in permitting inspection of ballot papers.

In the instant case, in the very nature of things the allegations regarding the chemical treatment of the ballot papers can be proved or disproved only by inspecting the ballot papers. But the question is whether it is necessary to inspect all the ballot papers as has been ordered by the trial judge. A general inspection should not be permitted, until there is satisfactory proof in support of those allegations. For finding out whether there is any basis for those allegations, it would be sufficient if some ballot papers, say about 600 out of those polled by each of the returned candidates are selected from different bundles or tins in such a way as to get a true picture. He may also select about 200 ballot papers cast in favour of the election petitioners for comparison. If the learned judge comes to the conclusion that the matter should be further probed into, he may take evidence on the points in issue including evidence of expert witnesses. Thereafter it is open to him to direct or not to direct a general inspection of the ballot papers. But in doing so he will take care to maintain the secrecy of the ballot.

V.K. ——— *Appeals dismissed.*

[END OF VOLUME (1971) II S C J (N.R C)]

officer which cast serious aspersions on the appellant's reputation and mentioned quite a few instances of his lack of probity. The endorsement of the Chief Minister on the note read:

"Secretary, P. W. D. I had this (petition already mentioned) from the Director of Vigilance. This may be immediately looked into. I have asked the Director to pursue the investigation further."

Thereupon the Chief Secretary orally ordered a full-fledged enquiry in the matter and the Deputy Superintendent of Police, Vigilance and Anti-Corruption one G. K. Ranganathan, was asked to make a personal enquiry and report under the supervision of R. N. Krishnaswamy. The Director of Vigilance registered an enquiry numbering 8/HD/64 on 15th April, 1964. That the enquiry was taken up with great keenness appears from a note of Ranganathan to the effect that he would require the assistance of two Inspectors to assist him. There can be no doubt that the enquiry launched by the Vigilance and Anti-Corruption department was a very thorough and searching one. A very large number of persons were examined by the Vigilance and Anti-Corruption officers including 18 public servants who spoke to matters touching the allegations against the appellant. Statements in writing signed by the makers were taken from no less than nine public servants regarding the above and two of them, namely, S. Sivasubrahmanyam and S. Chidambaram were given certificates assuring them immunity from prosecution for the part played by them in rendering aid to the appellant in the commission of his malpractices. These two persons occupied the position of an Assistant Engineer and a Junior Engineer and were subordinates of the appellant. On 27th June, 1964 a first information report was lodged in the Directorate of Vigilance and Anti-Corruption, Madras and the case recorded as 3/AC/64. The offences to be investigated into were under sections 161 and 165 of the Indian Penal Code and section 5 (1) (a) and (d) of the Prevention of Corruption Act. The complaint was made by Ranganathan, Deputy Superintendent of Police, Vigilance and Anti-Corruption department

to the Additional Superintendent of Police in the same department. It is pertinent to note that the Directorate of Vigilance and Anti-Corruption which had been set up under a Government order dated 8th April, 1964 was declared to be a "police station" under clause (s) of sub-section (1) of section 4 of the Code of Criminal Procedure, by a notification dated 25th May, 1964 and by another notification of the same date the Governor of Madras conferred upon the Director and the Superintendents of Police of the said Directorate all the ordinary powers of a Magistrate of the First Class under section 5-A of the Prevention of Corruption Act within the limits of the whole of the State of Madras except the Presidency town. The complaint by Ranganathan to the Additional Superintendent of Police, Vigilance and Anti-Corruption, gave details of various malpractices with which the appellant was charged. He was *inter alia* said to have obtained various articles of furniture with the help of Sivasubrahmanyam and Chidambaram mentioned above by paying only a small fraction of the cost and asking them to adjust the balance by manipulations of the muster rolls claims. He was also said to have got his residence whitewashed in a similar manner. It was also alleged against him that he had constructed a bungalow by diverting building materials allotted for the construction of the Cauveri bridge at Tiruchirapalli. The complaint wound-up with a paragraph to the effect that a criminal case would be registered against him as a regular investigation alone would facilitate the collection of additional evidence by way of recovery of valuable things which he had obtained from his subordinates by various illegal means and in addition more incriminating evidence was likely to be forthcoming during the investigation. Sanction to prosecute the appellant was obtained on 27th September, 1964 and a charge-sheet was filed against the appellant in the Court of the Special Judge, Madras on 5th October, 1964 numbered as C. C. No. 10 of 1964. No less than 47 witnesses had been examined during the investigation following the first information report and at least nine of them had been previously examined at what was termed as a "preliminary or detailed enquiry".

3 No less than 19 malpractices were alleged against him in different paragraphs of the charge sheet and the appellant was charged with having obtained for himself or for members of his family various valuable thing from his subordinates by corrupt and illegal means and by abusing his position as a public servant. The charges were for offences already mentioned.

4 In the enquiry the appellant was supplied with copies of records on which the prosecution proposed to rely including the statements recorded by the investigating officer which according to the appellant showed *prima facie* that a number of public servants who had given the statements were themselves responsible for commission of various offences including falsification of accounts and forgery of public records.

5 Before the Special Judge the appellant moved an application for discharge under section 251-A of the Code of Criminal Procedure on the ground that the charges against him were groundless. In that application he also complained (a) that the instances alleged against him related mostly to his personal matters unconnected with his official functions, (b) that none of the items referred to in the charge had been handed over to or delivered to him for the purpose of securing an advantage in order to attract section 5 (1) (d) read with section 5 (2) of the Prevention of Corruption Act, and (c) that on the admitted statements of the public servants they were liable to be charged with various offences and he had been greatly prejudiced by discriminatory treatment.

6 While holding that there was no basis of charging the appellant under section 165 Indian Penal Code, or under section 5 (2) read with section 5 (1) (b) of the Prevention of Corruption Act, the Judge held that a charge could be framed against him under section 5 (2) read with section 5 (1) (d) of the Act. He observed that the investigating officers evidently felt that if they arraigned the subordinate officers along with the appellant the case may fail for lack of evidence.

7 Against that order dated 16th January 1965 the Public Prosecutor preferred Cr

R C No 294 of 1965 and the appellant preferred Cr M P No 934 of 1965 under section 561-A of the Code, for quashing the proceedings and discharging him as the charge was groundless. The appellant filed two writ petitions before the High Court, namely, one for a writ of *mandamus* directing the forbearing from prosecution of C C No 10 of 1964 and a second for a writ of *certiorari* to quash the order of the Special Judge mentioned above. There was a petition under sections 435-439 of the Criminal Procedure Code for revision of the order of the Special Judge and one under section 561 A of the Code for quashing his said order.

8 The High Court dealt with all the Writ Petitions and the different allied matters together. Broadly speaking, it was urged before the High Court

1 There had been such a violent departure from the provisions of the Code in the matter of investigation and cognizance of offences as to amount to denial of justice and to call for interference by the issue of prerogative writs.

2 The investigation and prosecution were wholly *mala fide* and had been set afoot by his immediate junior officer, one Sivasankar Mudaliar, Superintending Engineer, Madras who was related to the Chief Minister of the State.

3 The appellant's case was being discriminated from those of others who though equally guilty according to the prosecution case were not only not being proceeded against but were promised absolution from all evil consequences of their misdeeds because of their aid to the prosecution.

9 In his petition for the issue of a writ of *mandamus* by the High Court the appellant stated that it was only by persuing copies of the statements furnished to him under section 173 (4), Criminal Procedure Code that he found that 18 public servants had stated having given him valuables without any or adequate consideration and that it was at his instance that they had committed offences of criminal conspiracy under section 120-B Indian Penal Code, and criminal breach of trust of Government moneys under section 409, Indian Penal Code,

besides falsification of accounts etc. His positive case was that the Director of Vigilance and Anti-Corruption had obtained signed statements which were confessional and self-incriminatory from persons who were going to be called as witnesses by giving them assurances of immunity. These assurances were not only directed towards immunising them from prosecutions but also any departmental action likely to affect adversely the markers of the statements. The case of discrimination was based mainly on the above averments that the Directorate had singled him out leaving others who were equally guilty. According to the appellant this also showed *mala fides* and malice directed towards him.

10. Another main argument which was canvassed before the High Court related to the applicability of sections 162 and 163 of the Criminal Procedure Code and the effect of the violation thereof, if any. For the appellant, it was argued that the taking of signed statements from persons who were eventually going to be examined in the criminal proceedings by giving them assurances of immunity and thereafter relying on their subsequent unsigned statements as those under section 161 (3) of the Code for the purpose of section 173 amounted to a fraud on the procedure established by law. It was contended that as the statements recorded under section 161 were the material on which the Special Judge had to consider whether the charge was groundless under section 251-A of the Code, the illegality "corroding the foundation vitiated the enquiry and necessitated the discharge of the appellant."

11. The High Court examined the case made out in the affidavits of the appellant and the counter-affidavits on behalf of the State. It expressed great dissatisfaction at the variance in the attitude of the State in the different affidavits in that whereas in the first counter-affidavit there was no contradiction of the appellant's averment that assurances of immunity had been given to all the 18 persons examined before the lodging of the first information report, the plea put forward in a subsequent affidavit was that such assurance had been given only to two persons, namely, the two subordinates of the appellant and only after signed statements had been given by

them. The Court was however not satisfied that a direction was called for for the prosecution of the subordinate officers also. Further the High Court was not impressed with the plea of hostile discrimination against the appellant observing that although the "policy of not securing judicial pardon to accomplices by bringing them as approvers but retaining them at the sole discretion of the prosecution might be open to question" "that cannot by itself invalidate the arraignment of the persons actually put up for trial" specially where the persons charged was in a position to wield influence and power over those asked by him to aid him in commission of misconduct.

12. Although not of the view that the record before it established a case of *mala fide* or hostile discrimination against the appellant which called for the quashing of the proceedings, the High Court took the view that the investigation of the case under Chapter XIV of the Code should be held to have commenced when Ranganathan, the Deputy Superintendent of Police, started the enquiry on 15th April, 1964 on the reasoning that though "an enquiry may start with shadowy beginnings and vague rumours, once a police officer forms a definite opinion that there are grounds for investigating a crime, an investigation under the Code has started". According to the High Court.....

(a) "substantial information and evidence had been gathered before the so-called first information report was registered".

(b) the police officer who had conducted the enquiry prior to 27th June, 1964 was a person competent to enter upon investigation;

(c) admittedly there had been an earlier probe by the Vigilance Department prior to 10th March, 1964 on the basis whereof he was not re-employed;

(d) there was definite information to the Government contained in the report dated 13th March, 1964 relating to corrupt activities of the appellant; and

(e) the "delay on the part of the investigating officer in registering the first

information report may be an irregularity but certainly the statements recorded subsequent to the receipt of definite information of the commission of an offence in gathering evidence of the offence would nonetheless be statements recorded during investigation and hit by section 162 of the Criminal Procedure Code

13 With regard to the disregard of the provisions of sections 162 and 163 of the Code the High Court observed that the result of taking his signature to a statement would be to tie a witness down to the statement or at least to give him the impression that he could not be free to make a different statement at the trial but the statement of a witness at the trial would not become inadmissible by reason of his having signed a statement before going into the witness box. Reference was made to several decisions bearing on section 162 of the Code and in particular to *Zaharuddin v King Emperor*¹, that the evidence of a witness who had previously signed a statement in writing did not become inadmissible or vitiate the whole proceeding although the value of the evidence would be seriously impaired thereby.

14 The Court seems to have been of the view that it was the duty of the Magistrate or the presiding Judge on discovering that a witness had while giving evidence, made material use of a statement given by him to the police to disregard the evidence of that witness as inadmissible. The High Court's definite conclusion was that there had been a deliberate violation of the provisions of the Code and a departure from a recognised and lawful procedure for investigation.

15 With regard to the propriety of taking self incriminatory statements even when there had been no assurance of immunity from prosecution the High Court observed that as the learned Advocate-General for the State had stated that the record of manipulations in the muster rolls by the subordinate officers of the appellant had to be disregarded as not proper material for consideration as the Special Judge had not considered these vitiating factors in

regard to the documents placed before him while ordering the framing of charges against the appellant' it was unnecessary to examine the question at length.

16 The High Court found partly in favour of the appellant and held that the order of the Special Judge directing the framing of a charge on consideration of the statements before him under section 173 (4) of the Code without reference to the illegalities in the investigation should be quashed. The High Court further directed the Special Judge to take up the matter once again and consider the case excluding from consideration all statements recorded under sections 161 (3) and 164 which were found vitiated in the light of the observations made by it. A direction was also given to exclude portions of the statements which were self incriminatory and confessional in character of the maker even if the same did not otherwise violate the provisions of sections 162 and 163 of the Code.

17 In our view the procedure adopted against the appellant before the laying of the first information report though not in terms forbidden by law, was so unprecedented and outrageous as to shock one's sense of justice and fairplay. No doubt when allegations about dishonesty of a person of the appellant's rank were brought to the notice of the Chief Minister it was his duty to direct an enquiry into the matter. The Chief Minister in our view pursued the right course. The High Court was not impressed by the allegation of the appellant that the Chief Minister was moved to take an initiative at the instance of a person who was going to benefit by the retirement of the appellant and who was said to be a relation of the Chief Minister. The High Court rightly held that the relationship between the said person and the Chief Minister, if any was so distant that it could not possibly have influenced him and we are of the same view. Before a public servant whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person, specially

¹ (1947) L.R. 74 I.A. 65 at 74 1 L.R. (1948) Mad 1 (1947) M.L.J. 219

one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general. If the Government had set up a Vigilance and Anti-Corruption Department as was done in the State of Madras and the said department was entrusted with enquiries of this kind, no exception can be taken to an enquiry by officers of this department but any such enquiry must proceed in a fair and reasonable manner. The enquiring officer must not act under any preconceived idea of guilt of the person whose conduct was being enquired into or pursue the enquiry in such a manner as to lead to an inference that he was bent upon securing the conviction of the said person by adopting measures which are of doubtful validity or sanction. The means adopted no less than the end to be achieved must be impeccable. In ordinary departmental proceedings against a Government servant charged with delinquency, the normal practice before the issue of a charge-sheet is for some one in authority to take down statements of persons involved in the matter and to examine documents which have a bearing on the issue involved. It is only thereafter that a charge-sheet is submitted and a full-scale enquiry is launched. When the enquiry is to be held for the purpose of finding out whether criminal proceedings are to be resorted to the scope thereof must be limited to the examination of persons who have knowledge of the affairs of the delinquent officer and documents bearing on the same to find out whether there is *prima facie* evidence of guilt of the officer. Thereafter the ordinary law of the land must take its course and further inquiry be proceeded with in terms of the Code of Criminal Procedure by lodging a first information report.

18. The Code of Criminal Procedure is an enactment designed *inter alia* to ensure a fair investigation of the allegations against a person charged with criminal misconduct. Chapter XIV of the Code gives special powers to the police to investigate into cases whether cognizable or non-cognizable in the manner provided therein. Section 160 empowers a police officer making an investigation to require attendance before himself of any person

who appears to be acquainted with the circumstances of the case. Section 161 (1) gives him the right to examine orally any person supposed to be acquainted with the facts and circumstances of the case. Although bound to answer questions put to him, sub-section (2) of the section exempts a person from answering any question which would have a tendency to expose him to a penal charge or to a penalty for forfeiture. Under sub-section (3) the police officer is empowered to reduce into writing any statement made to him in the course of such examination. Section 162 (1) expressly lays down that such a statement made in the course of an investigation if reduced into writing is not to be signed by the maker thereof and no part of such statement except as expressly provided is to be used for any purpose at any enquiry or trial in respect of any such offence under investigation at the time when the statement was made. The only exceptions to these are cases, when the statement falls under section 32 clause (1) of the Evidence Act and to statements which are covered by section 27 of that Act. The obvious idea behind this provision is that an over-zealous police officer may not misuse his position by getting a statement in writing signed by the maker which would tend to pin him down to the statement but leave him free to speak out freely when called to give evidence in Court. In order that statements made in the course of such investigations be recorded without any pressure or inducement by an investigating officer section 163 (1) lays down an embargo on the investigating authorities using any inducement, threat or promise to the maker which might influence his mind and lead him to suppose that thereby he would gain any advantage or avoid any evil in reference to his conduct as disclosed in the proceedings. It is to be noted that whereas the other sections hereinbefore referred to contain guidelines for the police officers in making investigation, this section expressly provides that any person in authority even if he is not a police officer must guide himself accordingly, in case where a crime is being investigated under this Chapter of the Code. All this is however subject to the provisions of sub-section (2) which allows a person to make any statement against his own interest by way of confession if

he does so of his own free will. Even then the law enjoins by section 164 that such a statement or confession can only be recorded by a Magistrate of the Class mentioned therein and even such a Magistrate must explain to the person making the confession before recording the same, that he is not bound to make it and if he does so it may be used as evidence against him. Further the Magistrate must make sure that the person was making the confession voluntarily and not acting under any pressure from an outside source.

19 All the above provisions of the Code are aimed at securing a fair investigation into the facts and circumstances of the criminal case, however serious the crime and howsoever incriminating the circumstances may be against a person supposed to be guilty of a crime. The Code of Criminal Procedure aims at securing a conviction if it can be had by the use of utmost fairness on the part of the officers investigating into the crime, before the lodging of a charge sheet. Clearly the idea is that no one should be put to the harassment of a criminal trial unless there are good and substantial reasons for holding it.

20 Section 169 of the Code empowers a police officer making investigation to release an accused person from custody if there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of him to a Magistrate by taking a bond from him with or without sureties. Section 173 enjoins upon a police officer to complete the investigation without unnecessary delay and forward to a Magistrate empowered to take cognizance of the offence a report in the form prescribed by Government setting forth *inter alia* the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case and to communicate to the State Government the action taken by him to the person if any by whom information relating to the commission of the offence was first given. When a report has been made under this section it is the duty of the officer in charge of the police station to furnish to the accused before the commencement of the enquiry or trial a copy of the report above mentioned

and of the first information report under section 154 and of all other documents or relevant extracts on which the prosecution proposes to rely including the statements and confessions, if any, recorded under section 164 and the statements recorded under sub section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses.

21 In our view the enquiring officer pursued the investigation with such zeal and vigour that he even enquired into and took down statements of persons who were supposed to have provided the appellant with articles of food worth trifling sums of money long before the launching of the enquiry. The whole course of investigation as disclosed in the affidavits is suggestive of some predetermination of the guilt of the appellant. The enquiring officer was a high ranking police officer and it is surprising that simply because he was technically not exercising powers under Chapter XIV of the Criminal Procedure Code, in that a formal first information report had not been lodged he overlooked or deliberately overstepped the limits of investigation contained in the said Chapter. He recorded self incriminating statements of a number of persons and not only secured their signatures thereto obviously with the idea of pinning them down to those but went to the length of providing certificates of immunity to at least two of them from the evil effects of their own misdeeds as recorded. It was said that the certificates were given after the statements had been signed. It is difficult to believe that the statements could have been made before the grant of oral assurances regarding the issue of written certificates. There can be very little doubt that the persons who were given such immunity had made the statements incriminating themselves and the appellant under inducement, threat or promise as mentioned in section 24 of the Indian Evidence Act.

22 It is no doubt the duty of the State to track down and punish all delinquent officers but it is certainly not in accordance with justice and fairplay that their conviction should be sought for by such questionable means.

23 The office of the Directorate of Vigilance and Anti-Corruption Depart-

ment, Madras, became a police station for the purpose of the Criminal Procedure Code under sub-clause (s) of sub-section (1) of section 4 of the Code by a notification dated 25th May, 1964. Prior to that it was only functioning under a Memorandum No. 1356/64-2 dated 8th April, 1964, when it was set up to ensure the maintenance of the highest standard of integrity and probity in public servants. If the investigation had been taken up after 25th May, 1964, it would have been one under Chapter XIV of the Code without any doubt.

24. Although we are not disposed to concur with the view that the investigation under Chapter XIV of the Code started as early as 15th April, 1964, we are of opinion that there was no warrant for the Vigilance and Anti-Corruption Department which was in charge of one of the highest police officers of the State to disregard to provisions of sections 162 and 163 of the Code of Criminal Procedure. The investigation was of a type more thorough and elaborate than is usually to be found; as noticed already it was in charge of a senior police officer who had the assistance of two police inspectors in the matter. No blame attaches to them for making enquiries of a large number of persons but the whole course of investigation is suggestive of guidance by someone who was intimately familiar with the affairs of the appellant and his department and throwing out scents which the investigating officers were only too keen to pick up and follow.

The appellant may have been guilty of all the charges levelled against him but we cannot approve of the manner in which the investigation against him was conducted and an attempt made to lay a guideline for the persons who were to be cited as prosecution witnesses in their evidence at the trial. To say the least it would be surprising to find so many persons giving confessional and self-incriminatory statements unless they had been assured of immunity from the evil effects thereof whether oral or in writing.

25. There can be no excuse for the Directorate of Vigilance and Anti-Corruption for proceeding in the manner adopted in the preliminary enquiry before the lodging of the first information report. As soon as it became clear to them—and

according to the High Court it was before 13th March, 1964, in which we concur—that the appellant appeared to be guilty of serious misconduct, it was their duty to lodge such a report and proceed further in the investigation according to Chapter XIV of the Code. Their omission to do so cannot prejudice the appellant and the State ought not to be allowed to take shelter behind the plea that although the steps taken in the preliminary enquiry were grossly irregular and unfair, the accused cannot complain because there was no infraction (*sic*) of the rules of the Evidence Act on the provisions of the Code.

26. In our view the granting of amnesty to two persons who are sure to be examined as witnesses for the prosecution was highly irregular and unfortunate. It was rightly pointed out by the High Court:

“Neither the Criminal Procedure Code nor the Prevention of Corruption Act recognises the immunity from prosecution given under these assurances and that the grant of pardon was not in the discretion of police authorities”.

We are not impressed by the argument that the appellant was singled out from a number of persons who had aided the appellant in the commission of various acts of misconduct and that they were really in the position of accomplices. It was pointed out by the High Court that the prosecution may have felt that “if the subordinate officers were joined along with the appellant as accused the whole case may fall for lack of evidence”. In our view, if it be a fact that it was the appellant who was the head of the department actively responsible for directing the commission of offences by his subordinates in a particular manner, he cannot be allowed to take the plea that unless the subordinates were also joined as co-accused with him the case should not be allowed to proceed.

27. It was contended before us by the learned Advocate-General for the State of Madras that both the High Court and the Special Judge had gone wrong in the interpretation of section 5 (1) (b) of the Prevention of Corruption Act. Having heard Counsel on both sides, we find ourselves unable to sustain the view of the

High Court on this point. Omitting the portions of the section which are not relevant it reads

"5 (1) A public servant is said to commit the offence of criminal misconduct—

(a) * * *

(b) if he habitually accepts or obtains for himself any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person (whom he knows to have been or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or) having any connection with the official functions of himself or

* * * *

The portion of the sub section within brackets in our view qualifies the expression 'any person' in the same way as the portion reading "having any connection with the official functions of himself". So read 'any person having any connection with the official functions of himself' would include any subordinate of the person who accepts the valuable thing. The words 'of himself' do not refer to the person in the expression 'any person' but refers to the pronoun 'he' at the beginning of the sub section. A subordinate of the public servant would have connection with his official functions. In our view the sub section aims at folding within its ambit not only outsiders 'who are likely to be concerned in any proceeding or business transacted or about to be transacted' by the public officer but also any subordinate or any other person who is connected with the official functions of the public servant.

28 In the result, all the appeals are dismissed. Although we do not endorse the view of the High Court with regard to the date of the commencement of the investigation so far as Chapter XIV of the Code of Criminal Procedure is concerned, we do hold that serious irregularities were committed in the so-called "full fledged enquiry" to the prejudice of the appellant. We do not however feel that there is any need to modify the directions given by the High Court to the Special Judge who will follow the directions of

the High Court in addition to the modification indicated by us

V M K

Appeals dismissed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —S M Sikri and V Bhargava, JJ

The Union of India

*Appellant**

v

The Lonavala Borough Municipality of Lonavala and another

Respondent

Bombay District Municipal Act (III of 1901), section 59 (1) and Bombay Municipal Boroughs Act (VIII of 1925), section 73 and the notification of the Central Government under section 135 (1) of the Railways Act (IX of 1890) —Interpretation—"a rate on buildings and lands", meaning of—Single tax assessed as a rate on buildings and lands, if means consolidated tax under clause (c) of the second proviso to section 59 (1)

Under the new Rules of 1931 promulgated by the respondent Municipality under the Bombay Municipal Boroughs Act (XVIII of 1925) all the lands and buildings within the Municipal Borough became chargeable irrespective of their being owned by the Government. The Union of India representing the Central Railway filed the suit for refund of the entire amount which was collected by the respondent from the Railway in pursuance of the Rules of 1931.

Is the Railway liable to pay this consolidated tax?

Held, that in the year 1914 the respondent Municipality had only levied a rate on buildings and lands under clause (i) of section 59 (1) of the Bombay District Municipal Act (III of 1901). Subsequently in the year 1916, the respondent not only arranged for water supply and imposed a general water rate, it proceeded to make rules for imposition of a consolidated tax assessed as a rate on buildings and lands under clause (c) of the second proviso to section 59 (1) in lieu of the existing tax imposed as a rate on

buildings and lands under clause (i) as well as water rate imposed under clause (viii) of section 59 (1). Thereafter, the Central Government issued the notification dated 26th July, 1917, under section 135 (1) of the Railways Act making the G.I.P. Railway liable to tax on buildings and lands imposed by the respondent. It is to be noted that, in this notification, the Government used the word "tax" and not the word "rate". The tax imposed under section 59 (1) was described as "a rate on buildings and lands". If the intention of the Government had been that the G.I.P. Railway should be liable to that tax only, it could have used the word "rate" instead of the word "tax" in the notification.

The consolidated tax envisaged by clause (c) of the second proviso to section 59 (1) of the Act of 1901 is in lieu of separate imposition of any two or more of the taxes described in clauses (i), (vii), (viii) and (ix) which means that the power to impose this consolidated tax has been given for the purpose of substituting it for the multiple taxes which could be imposed under those clauses. This consolidated tax cannot, therefore, be held to be of the same nature as the taxes in all those clauses. The intention appears to be that, though the Municipality was empowered to impose four different kinds of taxes, it was permitted under clause (c) of the second proviso to simplify matters by having a single tax on buildings and lands in lieu of those multiple taxes. This being the nature, it obviously becomes a tax on buildings and lands, so that the notification of 26th July, 1917, clearly makes the Railway liable to payment of this tax.

[*Paras. 7 and 10.*]

Appeal from the Judgment and Decree dated the 10th/11th March, 1965 of the Bombay High Court in Appeal No. 26 of 1968 from Original Decree.

Dr. L.M. Singhai, Senior Advocate (*B.D. Sharma*, Advocate, with him), for Appellant.

H.R. Gokhale, Senior Advocate (*Dr. T.S. Chitale* and *Janendra Lal*, Advocates, and *B.R. Agarwala* Advocate of *M/s. Gagrati & Co.*, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Bhargava, J.—The Union of India, as the owner of the Central Railway, instituted a suit for refund of Rs. 2,76,967 collected as tax from the Railway Administration by the respondent Municipality during the period from 1931 till the institution of the suit in November, 1954. The facts leading up to the suit are that the G.I.P. Railway, which was a private Company, had land situated within the limits of the respondent Municipality. On this land, stood the railway station, their Water Reservoir at Bhushi, bungalows of officers, and certain other buildings. There were also vacant lands and some lands on which railway lines were laid out. In this area, which belonged to the G.I.P. Railway, the Railway Company itself built roads, supplied water from its Bhushi Reservoir, arranged for the lighting and provided other services. In fact, up to the year 1916, the Railway used to supply water even to the Municipality for its Bhushi Reservoir on payment. The Municipality was governed, at that time, by the Bombay District Municipal Act III of 1901 (hereinafter referred to as "the Act of 1901") under which a tax on lands and buildings situated within the municipal limits used to be charged at 4 per cent. of the annual rental value, but no tax was levied on the buildings and lands of the G.I.P. Railway, in view of section 135 of the Indian Railways Act (IX of 1890). In the year 1914, the Government of India issued a notification under section 135 of the Railways Act declaring that the Administration of the G.I.P. Railway, shall be liable to pay, in aid of the funds of the local authorities set out in the Schedule, the taxes specified against each of those authorities. Against the name of Lonavala Municipality, which is the respondent in this case, the tax mentioned was house-tax. Thus, the exemption granted to the Railway Administration was taken away by this notification in respect of house-tax and house-tax became payable by the G.I.P. Railway, to the respondent. In 1916, the respondent constructed its own water reservoir and became independent of the Railway for water supply, but no water rate was charged from the Railway even thereafter, though water charges for actual quantities of water sup-

plied in three of the bungalows was charged from the occupants of the bungalows. The rest of the Railway Colony continued to be supplied with water from the Railway Reservoir at Bhushi.

2 On 4th May, 1916 the respondent promulgated new rules for taxation and, instead of charging separate house-tax and water rate it decided to charge a consolidated tax assessed as a rate on buildings and lands in accordance with clause (c) of the proviso to section 59 (1) of the Act of 1901. Thereafter, it appears that the respondent demanded this consolidated tax from the Railway in respect of the Railway lands and buildings. The Railway felt that since under the notification of 1911, house tax only was payable by the Railway Administration, there was no justification for the respondent to charge consolidated tax from it and consequently protested against this payment. Thereafter on 26th July, 1917, the Government of India issued a fresh notification under section 135 of the Railways Act, whereby the Railway Administration was rendered liable to pay what was described as 'tax on lands and buildings'. On the issue of this notification, the respondent started charging the GIP Railway, this consolidated tax and this continued until some time in the year 1927 by which time the GIP Railway was taken over by the Government and became a Government undertaking. In the Rules promulgated on 4th May, 1916, the consolidated tax described as a general rate on buildings and lands was not chargeable on government property. Relying on this provision in the Rules an objection was raised that the charge of the tax was illegal when the Railway had become Government property.

3 Subsequently the respondent municipality amended its Rules and promulgated fresh rules on the 6th October, 1931. By this time, the respondent municipality had been constituted into a Borough under the Bombay Municipal Boroughs Act XVIII of 1925 (hereinafter referred to as 'the Act of 1925'). These new rules were thus promulgated under this Act of 1925. Under these rules, the exemption in respect of Government property to the charge of the general rate on buildings and lands, which was contained in the

Rules of 1916, was deleted and all lands and buildings within the Municipal Borough became chargeable irrespective of their being owned by the Government. A separate clause was incorporated giving certain exemptions, but, since they do not affect the case before us, they need not be mentioned. In pursuance of these Rules of 1931, the respondent started collecting the consolidated tax assessed as a rate on buildings and lands of the Railway from it.

4 In the year 1930, the Railway Administration preferred an appeal under section 110 of the Act of 1925 against one of the demand notices issued in respect of this tax on the 6th October, 1930. This appeal came up before the Sub-Divisional Magistrate, Western Division, Poona, who held that the levy of this consolidated tax was *ultra vires* and set aside the demand notice. On a revision by the respondent under section 111 of the Act of 1925, the District and Sessions Judge set aside the order of the Sub-Divisional Magistrate, holding that the imposition of the tax was valid. Against this decision the Railway Administration filed a revision before the High Court of Bombay under section 115 of the Code of Civil Procedure. The High Court, on 12th February, 1945, refused to exercise its special powers under section 115, Civil Procedure Code, with the further remark that the proper remedy to be sought was by means of a suit.

5 Under these circumstances, the Union of India which had come to be the owner of this Railway under the name of the Central Railway, filed the suit on 27th November, 1954 for refund of the entire amount which was collected by the respondent from the Railway in pursuance of the Rules of 1931. The trial Court held that the levy of this tax was void inasmuch as, under the notification issued on the 26th July, 1917, only the rate on lands and buildings was payable by the Railway Administration. The suit for the refund filed by the Union of India was, on this ground, decreed. On appeal the High Court disagreed with the trial Court and held that even the consolidated tax was payable in view of the notification of 26th July, 1917, so that the tax had been rightly collected. The High Court, thereupon,

set aside the decree of the trial Court and dismissed the suit. It is against this decree that the Union of India has come up in this appeal by certificate under Article 133 of the Constitution.

6. In order to appreciate the submissions made by Counsel for parties in this appeal, it is necessary to set out the relevant provisions of section 59 of the Act of 1901 and of section 73 of the Act of 1925 which are as follows—

"Section 59 of the Act of 1901:

59. (1) Subject to any general or special orders which the State Government may make in this behalf, any Municipality—

*	*	*	*	*
*	*	*	*	*

may impose, for the purposes of this Act, any of the following taxes, that is to say,

(i) a rate on buildings or lands or both, situate within the municipal district;

*	*	*	*	*
*	*	*	*	*

(vii) a general sanitary cess for the construction or maintenance, or both construction and maintenance, of public latrines, and for the removal and disposal of refuse;

(viii) a general water-rate or a special water rate or both for water supplied by the Municipality, which may be imposed in the form of a rate assessed on buildings and lands, or in any other form, including that of charges for such supply, fixed in such mode or modes, as shall be best adapted to the varying circumstances of any class of cases or of any individual case;

(ix) a lighting tax;

*	*	*	*	*
*	*	*	*	*

Provided further that—

*	*	*	*	*
*	*	*	*	*

(c) the Municipality in lieu of imposing separately any two or more of the taxes

described in clauses (i), (vii), (viii) and (ix) may impose a consolidated tax assessed as a rate on buildings or lands, or both situate within the municipal District".

"Section 73 of the Act of 1925:

73. (1) Subject to any general or special orders which the State Government may make in this behalf and to the provisions of sections 75 and 76, a municipality may impose for the purposes of this Act any of the following taxes, namey :—

(i) a rate on buildings or lands or both situate within the municipal borough:

*	*	*	*	*
*	*	*	*	*

(viii) a general sanitary cess for the construction and maintenance of public latrines, and for the removal and disposal of refuse;

*	*	*	*	*
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(x) a general water-rate or a special water-rate or both for water supplied by the municipality, which may be imposed in the form of a rate assessed on buildings and lands or in any other form, including that of charges for such supply, fixed in such mode or modes as shall be best adapted to the varying circumstances of any class of cases or of any individual case;

(xi) a lighting tax;

*	*	*	*	*
*	*	*	*	*

Provided further that—

*	*	*	*	*
*	*	*	*	*

(c) the municipality in lieu of imposing separately any two or more of the taxes described in clauses (i), (viii), (x) and (xi) may impose a consolidated tax assessed as a rate on buildings or lands or both situated within the municipal borough."

7. In the year 1914, the respondent-municipality had only levied a rate on buildings and lands under clause (i) of

section 59 (1) of the Act of 1901. There was no question of imposing a general or special water rate as the respondent had no water works of its own and was taking water supply from the G I P Railway. It was in these circumstances that the notification was issued by the Central Government dated the 13th May, 1914, making the Railway Administration liable to pay house tax to the Municipality of Lonavala. The notification was obviously intended to make the Railway liable to pay the tax which had been imposed as a rate on buildings and lands under section 59 (1) (i) of the Act of 1901 by the respondent. Subsequently, in the year 1916, the respondent municipality not only arranged for water supply and imposed a general water rate, it proceeded to make rules for imposition of a consolidated tax assessed as a rate on buildings and lands under clause (r) of the second proviso to section 59 (1) in lieu of the existing tax imposed as a rate on buildings and lands under clause (i) as well as the water rate imposed under clause (iv) of section 59 (1). Thereafter the Central Government issued the notification dated 26th July, 1917 under section 135 (1) of the Railways Act making the G I P Railway, liable to tax on buildings and lands imposed by the Lonavala Municipality. It is to be noted that in this notification, the Government used the word 'tax' and not the word 'rate'. The tax imposed under section 59 (1) was described as "a rate on buildings and lands". If the intention of the Government had been that the G I P Railway should be liable to that tax only, it could have used the word "rate" instead of the word "tax" in the notification. In fact, if the notification had been left untouched, the liability of the G I P Railway, would have continued to be in respect of the rate on buildings or lands because of the earlier notification of 1914, under which the Railway had been made liable to house tax. The notification of 26th July, 1917, made the Railway liable to tax on buildings and lands obviously because the Government intended that the Railway should be liable to the consolidated tax under clause (c) of the second proviso to section 59 (1). Clause (c) permits the imposition of a consolidated tax assessed as a rate on buildings or lands or both. The moment a tax is assessed as a rate on buildings or lands, it naturally becomes

a tax on buildings and lands. The fact that it was a consolidated tax was immaterial. It was this consolidated tax which was intended to be made payable by the G I P Railway, when the Central Government used the expression "tax on buildings and lands" in place of the earlier words "House Tax" and chose not to refer to the liability being in respect of a rate on buildings and lands. It is true that all taxes are not rates, but all rates are taxes. A rate on buildings and lands is a tax on buildings, so also any other tax assessed as a rate on buildings and lands becomes a tax on buildings and lands. We are unable to accept the submission made by Counsel for the appellant that the expression "tax on buildings and lands" used in the notification of 26th July, 1917, could only refer to a rate on buildings and lands under clause (i) of section 59 (1) and would not cover the consolidated tax referred to in clause (c) of the second proviso. It is true, as urged by him, that the tax under clause (c) of the second proviso is not identical with, and is different in nature from, the rate on buildings and lands imposed under clause (i), but that circumstance does not imply that it is not a tax on buildings and lands. The mere use of the word "consolidated" cannot make any difference to this interpretation. It is also significant that clause (c) of the second proviso does not purport to lay down that the consolidated tax will be the sum total of the taxes described in clauses (i), (ii), (iii), and (iv). The consolidated tax envisaged by that clause is in lieu of separate imposition of any two or more of the taxes described in clauses (i), (ii), (iii) and (iv) which means that the power to impose this consolidated tax has been given for the purpose of substituting it for the multiple taxes which could be imposed under those clauses. This consolidated tax cannot, therefore, be held to be of the same nature as the taxes in all those clauses. The intention appears to be that though the Municipality was empowered to impose four different kinds of taxes, it was permitted under clause (c) of the second proviso to simplify matters by having a single tax on buildings and lands in lieu of those multiple taxes. Such a single tax had to be assessed as a rate on buildings and lands. This being the nature, it obviously becomes a tax

on buildings and lands, so that the notification of 26th July, 1917 clearly makes the Railway liable to payment of this tax. The position under the Act of 1925 is exactly the same where also the language of clause (c) to the second proviso is identical with that contained in the Act of 1901, so that the liability imposed on the Railway by the notification of the Government dated 26th July, 1917, under section 135 (1) of the Railways Act continued even under the Act of 1925.

8. It is also significant to note that the Rules, which were framed by the Municipality under the Act of 1901, and by the Municipal Borough later under the Act of 1925, which were promulgated on the 4th May, 1916 and the 6th October, 1931, respectively, described the tax as a general rate on buildings and lands and under rule 1. It is true that, in the heading of the Rules, the expression used was that "the Rules were for the levy of a consolidated rate on buildings and lands", but, in the main provision, the tax was described only as "a general rate on buildings and lands". A general rate on buildings and lands is obviously a tax on buildings and lands and would, therefore, be covered by the notification of the Central Government dated 26th July, 1917.

9. Apart from this interpretation which we have arrived at on the basis of the language used in the two Acts, the Rules, and the notification of the Central Government, there are two circumstances which indicate that this must be the correct construction of the notification issued by the Central Government. The first circumstance is that, when this notification was issued, the only tax which was being imposed by the Lonavala Municipality which the Central Government could have intended should become payable by the G.I.P. Railway was the consolidated tax under clause (c) of the second proviso. There was no other tax which would have been covered by this notification. In fact, the notification would be meaningless if we were to hold that this consolidated tax is not covered by the expression "tax on buildings and lands". This notification was issued while the earlier notification of 1914 was already in existence and, if the intention was to cover only the rate mentioned in clause (1) of

section 59 (1), there was no need to issue this fresh notification as the liability of the Railway to pay that tax already existed under that notification of 1914.

10. The second circumstance that we can take notice of is the historical background in which this notification of 26th July, 1917, was issued. It appears that, after the Rules for imposition of this consolidated tax came into force in 1916, the Municipality demanded payment of this consolidated tax from the G.I.P. Railway. Thereupon, the Agent of the G.I.P. Railway Company wrote a letter to the Secretary, Railway Board, Simla, on the 1st December, 1916, stating that the Company did not agree that it should pay the new consolidated tax as it comprised a house-tax and a water rate. The Company had its own arrangements for the supply of water and it was obviously unfair that it should be called upon to pay any tax which includes a water rate, when no municipal water was being consumed by the Railway at Lonavala. The Secretary, Railway Board, forwarded this letter to the Secretary to the Government of Bombay, General Department, with a letter dated 12th December, 1916, enquiring whether the Agent's information was correct and, if so, whether the Bombay Government had any remarks to offer on the Agent's contentions. On 11th May, 1917, the Secretary to the Government of Bombay replied to the Secretary, Railway Board, pointing out that, originally, the Municipality proposed to levy a general water rate, on all houses, in addition to the existing house tax, but, on representations from property owners of Lonavala and Khandalla, it had decided to impose a consolidated rate on buildings and lands in lieu of the house-tax and the proposed general water rate. Consequently, they were levying, in lieu of house-tax a consolidated rate, which included a general water rate, on sliding scale, on all properties situated within the municipal limits. The water rate imposed was not intended to cover expenses on any service rendered in the nature of a general tax as opposed to a service tax. In equity, the Railway Company's property in Lonavala had no better right to exemption than the properties of private individuals who, although they did not take private pipe connections, were paying

the general water rate. In the circumstances, a request was made to the Secretary, Railway Board, to move the Government of India to declare the Administration of the G I P Railway liable to pay to the Lonavala Municipality the consolidated tax on buildings and lands in lieu of the house tax in respect of the railway properties situated within the municipal limits. It was suggested that the Schedule annexed to the notification dated 13th May, 1914, may be amended accordingly. It was in pursuance of this move by the Bombay Government that the notification of 26th July, 1917, was issued by the Central Government. That the notification of 26th July, 1917, was issued in pursuance of this correspondence is clarified by the Memorandum dated 17th August, 1917, with which a copy of the new notification was forwarded by the Government of India, Railway Department (Railway Board) to the Secretary to the Government of Bombay. These circumstances in which the notification of 26th July, 1917, was issued make it plain that the Government of India, when they used the expression "tax on buildings and lands" in the notification intended to make the G I P Railway liable to the consolidated tax which had been imposed by the Municipality under the Rules of 1916.

11 The decision of the Bombay High Court in *Borough Municipality, Ahmedabad v Ahmedabad Manufacturing and Calico Printing Co., Ltd.*¹ on interpretation of sections 73 and 110 of the Act of 1925, also supports the view that we have taken above. The question that arose in that case was whether the right of an appeal envisaged by using the expression "in the case of a rate on buildings or lands or both" in section 110 could be availed on in respect of a general water-rate imposed under clause (x) of section 73 (1) which described that tax as a general water rate imposed in the form of a rate assessed on buildings and lands. It was held that there was no distinction between a rate on buildings or lands and tax in the form of a rate assessed on buildings or lands. In the case before us, on that analogy, a consolidated tax assessed as a rate on buildings and lands cannot be distin-

guished from a tax on buildings and lands.

12 Reference may also be made to a decision of the Allahabad High Court in *Raza Buland Sugar Co., Ltd., Rampur v Municipal Board, Rampur*², where it was held that a water-rate is a tax on buildings and lands and is not, in fact, a service tax chargeable in respect of water supplied. Counsel for the appellant referred to a decision of the Madras High Court in *Municipal Council, Cuddapah v M & S M Ry Co., Ltd.*³, but that case is of no assistance as it turned on the special language which had been used in the Act and the notification which came up for consideration in that case. In fact, the expression that had to be interpreted was "property tax" and not "tax on buildings and lands". We agree with learned Counsel for the appellant that such assistance cannot be derived from the decision of this Court in *Patel Gordhandas Hargovindas v Municipal Commissioner, Ahmedabad*⁴, which was relied upon by the High Court. However, as we have held above, on the proper interpretation of the language used in the two Acts, the Rules, and the notification, and taking into account the circumstances under which the notification of 1917 was issued, the only conclusion that can be arrived at is that the Railway was made liable to this consolidated tax, so that the decision of the High Court is perfectly correct.

The appeal fails and is dismissed with costs.

V M K

Appeal
dismissed

1 AIR, 1962 All 83
2 ILR 52 Mad 779 57 M.L.J 471 AIR
1929 Mad 746
3 (1964) 2 S.C.R. 608 (1965) 1 S.C.J 15

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT.—A. N. Ray and I. D. Dua, JJ.

M/s. Pioneer Paper Box Factory
.. Appellants*

v.

Smt. Thakurdevi Shriniwas .. Respondent.

(A) *Bombay Rents, Hotel and Lodging House Rates Control Act (LVIII of 1947), section 12 (3) (b)—Scope—Tenant applying for fixation of standard rent—Agreed rent remaining unpaid for over one year—Suit for eviction filed by landlord—Standard rent fixed pending the suit for eviction—Suit coming on for hearing—Arrears on the basis of the standard rent paid but not the costs of the suit—Decree for eviction—Legality.*

The High Court of Bombay in revision against the appellate decree confirming the decree for eviction passed by the trial Court on the ground that the costs of the suit was not paid but only the arrears of rent on the basis of the standard rent fixed in the application by the tenant therefor, observed that the decree was passed on 5th October, 1956 and the appeal was filed on 18th October, 1956, and that the amount of costs was not deposited along with filing of Memorandum of Appeal and concluded by stating "the decree of the trial Court was made on 5th October, 1956 and we are in the year 1963. The attitude adopted by the petitioner is not such in which a discretion can be exercised in favour of the petitioner". Hence the appeal by Special Leave to the Supreme Court.

Held: section 12 (3) (b) of the Bombay Rent Act provides that no decree in eviction shall be passed, if on the first day of the hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in the Court the standard rent and permitted increase in rent due, and thereafter continues to pay or tender in Court regularly the said rent and permitted increase till the suit is finally decided and also pays costs of the suit as directed by the Court.

[Para. 5.]

* C.A. No. 36 of 1968.

26th May, 1970.

The appellant could be entitled to protection against eviction only if the appellant complied with the provisions of the statute. The appellant was required to tender not only the arrears of rent but also the costs of the suit. In the trial Court the appellant admitted non-compliance with the provisions of the statute. Therefore, the trial Court rightly held that the appellant was not entitled to any benefit or protection against eviction.

[Para. 8.]

(B) *Appeal to Supreme Court—Discretion exercised by the High Court when certain facts were not brought to its notice—Interference, not proper.*

No portion of the judgment of the High Court is open to any criticism for the obvious reason that when the memorandum of appeal was filed on 18th October, 1956 the costs were not paid. The application for review also indicates that when the matter was heard before the High Court it was not brought to the notice of the High Court that the costs were paid on 7th December, 1956, as alleged.

[Para. 10.]

It would be improper to interfere with exercise of discretion by the High Court when the matter was not brought to the notice of the High Court. Discretion is exercised by the Court in the facts and circumstances of the case. Any interference with the exercise of discretion in the present case would be substituting the discretion of this Court on a set of facts which were never presented to the High Court.

[Para. 11.]

Appeal by Special Leave from the Judgment and Order dated the 19th November, 1963 of the Bombay High Court in Civil Revision Application No. 1067 of 1959.

V. M. Tarkunde, Senior Advocate (P. C. Bhartari, Advocate and O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanyi & Co. with him) for Appellant.

A. K. Sen, Senior Advocate (M. S. Gupta and S. L. Jain, Advocates with him), for Respondent.

The Judgment of the Court was delivered by

Ray, J.—This appeal is by Special Leave from the judgment dated 19th November,

1963 of the High Court of Bombay dismissing the appellant defendant tenant's application for revision in a decree for eviction of the defendant

2 The appellant was tenant of the respondent. On 28th April, 1954, the appellant filed an application under section 11 of the Bombay Rent Act for fixation of standard rent. During the pendency of the application the respondent landlady served a notice on the appellant in the month of March, 1955 terminating the tenancy on the ground that the appellant had failed to pay rent from 1st March, 1954. On 25th April, 1955, a suit was filed for eviction of the appellant.

3 During the pendency of the suit on 29th June, 1956 the standard rent was fixed at Rs 55/7/- per mensem. The contractual rent was Rs 85 per mensem.

4 When the suit came up for hearing on 5th October, 1956, it appeared that the appellant paid all the arrears of rent in accordance with the standard rent but did not pay the costs of the suit. The trial Court passed an ejectment decree against the appellant.

5 The appellant preferred an appeal. The appellate Court took the view that the order of the trial Court was justified under section 12 (3) (b) of the Bombay Rent Act. Section 12 (3) (b) of the Bombay Rent Act provides that no decree in eviction shall be passed, if on the first day of the hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in the Court the standard rent and permitted increase in rent due, and thereafter continues to pay or tender in Court regularly the said rent and permitted increase till the suit is finally decided and also pays costs of the suit as directed by the Court.

6 The appellant then filed an application for revision in the High Court. The contention which was advanced in the High Court and repeated here was that the Courts were in error in decreeing the suit for non payment of costs because the trial Court had not passed any order fixing the amount of costs. It was said that only when an order determining the amount of costs had been made by the Court that the tenant could be said to be within the mischief of the provisions

of the statute for non payment of costs so determined by the Courts.

7 The High Court rightly rejected the contention for two reasons. First, though a formal order as to costs was not made, yet the trial Court had made an order directing the appellant to pay the amount of costs and the appellant did not pay the costs. Secondly, the appellant stated before the trial Court that the appellant was not in a position to tender what is described as "professional costs" and Court costs of the suit.

8 It is indisputable that in the trial Court the appellant not only admitted failure to pay costs but also inability to tender the costs. The appellant could be entitled to protection against eviction only if the appellant complied with the provisions of the statute. The appellant was required to tender not only the arrears of rent but also the costs of the suit. In the trial Court the appellant admitted non-compliance with the provisions of the statute. Therefore, the trial Court rightly held that the appellant was not entitled to any benefit or protection against eviction.

9 The appellate Court held that because the appellant filed an application for fixation of standard rent and therefore there being a dispute between the parties regarding the standard rent no order in eviction could be passed under section 12 (3) (a) of the Bombay Rent Act. The appellate Court, however, held that the case fell within the provisions of section 12 (3) (b) of the Bombay Rent Act by reason of the failure of the appellant to pay costs of the suit.

10 Counsel for the appellant contended that the costs were deposited on 22nd November, 1956 and therefore the High Court should have exercised discretion in favour of the appellant. The High Court stated that the decree was passed on 5th October, 1956, and the appeal was filed on 18th October, 1956 and the amount of costs was not deposited with the filing of the memorandum of appeal. The High Court concluded by stating that:

'the decree of the trial Court was made on 5th October, 1956. We are in the year 1963. The attitude adopted by the petitioner is not such

in which a discretion can be exercised in favour of the petitioner”.

The High Court heard the application on 19th November, 1963. Counsel for the appellant invited our attention to paragraph 13 of the application for review made in the High Court where the appellant alleged that on 7th December, 1956 the costs were paid. No portion of the judgment of the High Court is open to any criticism for the obvious reason that when the memorandum of appeal was filed in the High Court (*sic.*) on 18th October, 1956, the costs were not paid. The application for review also indicates that when the matter was heard before the High Court it was not brought to the notice of the High Court that the costs were paid on 7th December, 1956, as alleged.

11. The appeal is from the judgment of the High Court. It would be improper to interfere with exercise of discretion passed by the High Court when the matter was not brought to the notice of the High Court. Discretion is exercised by the Court in the facts and circumstances of the case. Any interference with the exercise of discretion in the present case would be substituting the discretion of this Court on a set of facts which were never present d to the High Court.

12. The appellant was not entitled to any relief under the provisions of the Bombay Rent Act. The High Court rightly rejected the application for revision. The appeal fails and is dismissed with costs.

K.G.S.

*Appeal
dismissed*

THE SUPREME COURT OF INDIA.
(Civil Appellate Jurisdiction.)

PRESENT.—*J. C. Shah and A. N. Grover, JJ.*

Naresh Chandra Sanyal ... *Appellant**
v.

The Calcutta Stock Exchange Association Ltd. ... *Respondent.*

(A) *Company—Forfeiture of shares—Calcutta Stock Exchange Association Ltd.—Articles of Association of—Article 24—Scope—Proper interpretation.*

The argument that a member of the Calcutta Stock Exchange Association Ltd. forfeits his share only if a resolution expelling him and a resolution declaring him a defaulter are passed is without substance. The conjunction ‘and’ between the first two clauses of Article 24 of the Articles of Association of the Calcutta Stock Exchange Association Ltd. is used to indicate an alternative and does not make the two conditions cumulative. [Para. 8.]

(B) *Company — Forfeiture of shares—Calcutta Stock Exchange Association Ltd.—Articles of Association of—Articles 22, 24, 26, 27 and 29 relating to forfeiture of shares in certain events—Validity.*

A forfeited share is merely a share available to the Company for sale and remains vested in the company for that purpose only. By forfeiting a share pursuant to the authority of the Articles of Association, no reduction of capital is achieved. It cannot be contended that forfeiture of shares is permissible only in cases expressly contemplated by Table A—Model Articles *i.e.*, for non-payment of calls in respect of a share which is not fully paid up. [Para. 15.]

Subject to the provisions of the Companies Act the company and the members are bound by the provisions contained in the Articles of Association. The Articles regulate the internal management of the company and define the powers of its officers. They also establish a contract between the company and the members

* C.A. No. 1626 of 1966. 25th September, 1970.

and between the members *inter se*. The contract governs the ordinary rights and obligations incidental to membership in the company. In the absence of any provisions contained in the Companies Act which prohibit a company from forfeiting a share for failure on the part of the member to carry out an undertaking or an engagement the Articles of the company which provide that in certain events membership rights of the shareholder including his right to the share will be forfeited are binding. The Articles of Association of the Calcutta Stock Exchange Association Ltd expressly provide that in the event of the member failing to carry out the engagement and the conditions specified therein his share shall stand forfeited. Articles 22, 24, 26, 27 and 29 of the Exchange relating to forfeiture of shares in certain events are therefore valid. [Para 16]

(C) *Company—Forfeiture of shares—Calcutta Stock Exchange Association Ltd—Articles of Association of—Article 27—Power of Committee of Calcutta Stock Exchange Association Ltd, to order sale of forfeited share*

There is no substance in the plea that the Committee of the Calcutta Stock Exchange Association Ltd has no jurisdiction to order sale of the share forfeited. Article 27 of the Articles of Association declares that the forfeited share is the property of the Association and that the Committee of the Association shall sell, re allot or otherwise dispose of the share for satisfaction of all debts due by the member to the Association or to its members out of transactions in shares and stocks. Under its Articles the Association has authority to sell the share and to appropriate the sale proceeds towards satisfaction of the debts liabilities or engagements. [Para 18]

(D) *Contract Act (IY of 1872), section 74—Calcutta Stock Exchange Association Ltd—Articles of Association of—Articles 29 and 33—Forfeiture of share for default committed by member—Association is entitled to amount remaining due after satisfaction of the liabilities of the defaulter*

Under the stipulation contained in Articles 21, 22 and 24 of the Articles of Association of the Calcutta Stock Exchange Association Ltd, the share of the defaulter or expelled member stands forfeited for

failure to fulfil his obligation after applying the amount realised on sale of the share towards satisfaction of the debts, liabilities and engagements of the defaulter to the Association and its members, the balance remaining in the hands of the Association had to be held for and on behalf of the defaulter. This is expressly provided by Article 33. The expression used in Article 29, 'the forfeiture shall involve the extinction of all interest', is subject to those rights as by the Articles are saved and Article 33 saves to the defaulting shareholder whose share is forfeited the right to the balance remaining with the Association. Even assuming that Articles 24 and 31 reserve to the Association two distinct powers—the power to forfeit and the power to exercise a lien, and that Article 33 only applies to sale in enforcement of a lien and not to a sale under Article 27, the balance remaining in hand after satisfying the liabilities and obligations of the defaulter must still be returned to the defaulting shareholder. The power to forfeit does not imply authority to appropriate the balance remaining in hand after satisfying the liabilities and obligations of the defaulter to the Association and its members. Any such implication would be contrary to the intendment of section 74 of the Contract Act. [Para 19]

Appeal from the Judgment and Decree dated the 7th/8th July, 1964 of the Calcutta High Court in Appeal from Original Decree No 143 of 1960

R B Datar, Advocate, *amicus curiae* for Appellant

B Sen Senior Advocate (*N R Khaitan* and *B P Maheshwari*, Advocates, with him), for Respondent

The Judgment of the Court was delivered by

Shah J—Nares Chandra Sanyal was the holder of a fully paid up share of the Calcutta Stock Exchange Association Ltd—hereinafter called the 'Exchange'. As a member of the Exchange he was authorised to carry on business as a broker in shares, stocks and securities in the hall of the Exchange. In December, 1951, Sanyal purchased one hundred shares of

the Indian Iron and Steel Company Ltd. from Johurmull Daga and Company, but did not arrange to take delivery of the shares on the due date. Johurmull Daga and Company sold the shares pursuant to the authority given to them by the Sub-Committee of the Exchange. The transaction resulted in a loss of Rs. 438-10. The Sub-Committee directed Sanyal to pay the amount due by him, but he failed to carry out that direction.

2. On 7th January, 1942, the complaint of Johurmull Daga and Company was referred to the Full Committee of the Exchange. Sanyal failed to pay the amount directed to be paid by him and he was by resolution dated 19th February, 1942, declared a defaulter. On 1st September, 1942, at a meeting at which Sanyal was present, the Full Committee resolved that the share standing in his name be forfeited to the Exchange with effect from 1st September, 1942 and that Sanyal be expelled from the membership of the Exchange.

3. Sanyal then instituted an action in the High Court of Calcutta on its original side, claiming a declaration that the articles of the Exchange providing for "forfeiture of a fully paid-up share were *ultra vires* and illegal" and that "particularly Articles 21, 22 and 24 were invalid"; that the share held by him had not been "properly forfeited" by the Exchange and that forfeiture of the share was "irregular, void and inoperative and was not binding upon him". He also claimed an order that he be restored to the membership of the Exchange and that the share register be rectified accordingly. In the alternative Sanyal claimed a decree for Rs. 55,000 being the value of the share, or in any event to the surplus of the sale proceeds after "liquidating the debts due by him to the Exchange". The suit was resisted by the Exchange. The trial Court dismissed the suit. In appeal under the Letters Patent the decree was confirmed. With Special Leave Sanyal has appealed to this Court *in forma pauperis*.

4. The relevant Articles of Association of the Exchange are these:

Article 21.—"The Committee shall have power to expel or suspend any

member or if being firm any member or authorised assistant of the firm in any of the even's following:—

* * * * *

(6) If the member or if being a firm any member or authorised assistant of the firm refuses to abide by the decision of the Committee in any matter which under these articles or under the Bye-laws for the time being in force is made the subject of a reference to the Committee.

* * * * *

Provided always that in every case arising under the provisions of sub-section (5), (6), (7) and (8) of this Article no resolution for the expulsion of a member or if being a firm any member or authorised assistant of the firm shall be valid unless passed by a majority consisting of not less than two-thirds of the member of the Committee at a meeting specially convened for the purpose and at which meeting not less than two-thirds of the members of the committee at a meeting specially convened for the purpose and at which meeting not less than seven members of the Committee shall be present".

Article 22—"Any member who has been declared a defaulter by reason of his failure to fulfil any engagement between himself and any other member or members and who fails to fulfil such engagements within six months from the date upon which he has been so declared a defaulter shall at the expiration of such period of six calendar months automatically cease to be a member".

Article 24—"Upon any member ceasing to be a member under the provisions of Article 22 hereof and upon any resolution being passed by the Committee expelling any member under the provisions of Article 21 hereof or upon any member being adjudicated insolvent the share held by such member shall *ipso facto* be forfeited".

Article 27—"Any share so forfeited shall be deemed to be the property of the Association, and the Committee shall sell callot, and otherwise dispose

of the same in such manner to the best advantage for the satisfaction of all debts which may then be due and owing either to the Association or any of its members arising out of transactions or dealings in stocks and share.

Article 28—"Any member whose share has been so forfeited shall notwithstanding be liable to pay and shall forthwith pay to the Association all moneys owing by the member to the Association at the time of the forfeiture together with interest thereon, from the time of forfeiture until payment at 12 per cent per annum and the committee may enforce the payment thereof, without any deduction or allowance for the value of the share at the time of forfeiture."

Article 29—"The forfeiture of a share shall involve the extinction of all interest in and also of all claims and demands against the Association in respect of the share, and all other rights incidental to the share, except only such of those rights as by these Articles expressly saved."

Article 31—"The Association shall have a first and paramount lien upon the share registered in the name of each member and upon the proceeds of sale thereof for his debts liabilities and engagements * * *"

Article 32—"For the purpose of enforcing such lien the Association may sell the share subject thereto in such manner as they think fit * * *"

Article 33—"The net proceeds of any such sale shall be applied in or towards satisfaction of the debts, liabilities, or engagements, residue (if any) paid to such member, his executors, administrators, committee curator or other representatives."

5 The relevant bye-laws of the Exchange are

"Settlement of Disputes—All disputes, complaints and claims between by and against members shall, on the application of either party, be decided by the Committee or by a Standing or Special Sub Committee appointed by the Committee for the purpose. In the event of the matter being decided by the Committee the decision shall be

final and binding upon all members concerned but any member aggrieved with the decision of the Standing or Special Sub Committee may, within seven days of such decision being given, appeal to the Committee whose decision shall be final. In the event of any member or members refusing, neglecting or failing to observe, carry out or comply with any decision of the Committee, or if no appeal is preferred, with the decision of the Standing or Special Sub Committee, such member or members so in default shall be dealt with by the Committee under the rules, regulations and/or bye laws of the Association for the time being in force."

Bye law 13—"Defaulters—Any member who shall fail to pay any subscription or other moneys due by him to the Association on due date, or who shall fail to fulfil any engagement between himself and another member or members may be declared a "defaulter" by the Committee and on such declaration his name shall be posted as a 'defaulter' on the notice board of the Association and so long as his name remains so posted he shall not be at liberty to exercise any of the privileges of membership."

6 Under the scheme of the Articles of Association of the Exchange, the Committee is authorised to expel or suspend a member on the ground, *inter alia*, that he refuses to abide by the decision of the Committee in any matter which is under the Articles or under the Bye laws referred to the Committee. A person declared a 'defaulter' because he fails to fulfil any engagement between himself and any other member or members within six months from the date on which he has been declared a defaulter, ceases to be a member of the Exchange and his share also stands forfeited. The share so forfeited is deemed to be the property of the Exchange. But the Committee must sell, re allot or otherwise dispose of the share for satisfaction of the debts which may then be due and owing by the defaulter to the Exchange or to any of its members arising out of transactions or dealings in stocks and shares. Forfeiture of a share involves extinction of all interest in and also of all claims and demands against the Exchange in respect

of the share and all other rights incidental to the share, but not the liability of the erstwhile member to discharge his liabilities to the Exchange. The Exchange has a first lien upon the share of a member and upon the proceeds of sale thereof for his debts and liabilities, and in enforcement of the lien, the Exchange may sell the share. The net proceeds of the share subject to the lien if sold will be applied in or towards satisfaction of the debts, liabilities or engagements of the shareholder and the residue, if any, paid to such member, his executors, administrators, committee, curator or other representatives.

7. In this appeal Counsel for Sanyal contended,

that under the Indian Companies Act, 1913, a fully paid-up share cannot be forfeited for failure to carry out any engagement by the shareholder other than an engagement to pay a call made by the Company to pay unpaid capital;

that the procedure followed by the Sub-Committee of the Exchange was irregular in that Sanyal had no notice of the meeting of the Committee to declare him a defaulter ;

that the Committee had no authority under the Articles of Association to direct sale of the share ; and

that in any event Sanyal was entitled to the balance remaining on hand with the Exchange after satisfying his debts, liabilities and engagements under the Articles of Association.

8. For failure to abide by the decision of the Committee in respect of his liability to pay the amount of loss due to Johurmull Daga & Company, Sanyal was declared a defaulter, and when he continued to remain a defaulter for six months he was by resolution of the Full Committee expelled from the membership of the Exchange. The Full Committee also resolved to forfeit his share. The Exchange thereafter disposed of the share for Rs. 55,000. The argument raised by Counsel for Sanyal that a member of the Exchange forfeits his share only if a resolution expelling him and a resolution declaring him a defaulter are passed is without substance. The conjunctive 'and' between the first two clauses of

Article 24 is used to indicate an alternative, and does not make the two conditions cumulative. We agree with the observations of Panckridge, J., in *Surajmull Mohta v. Ballabhdas Mohta*¹, that Article 24 'is carelessly drawn, because, on its literal application, before his share could be forfeited, a member would both have to be expelled by the Committee under Article 21 and automatically cease to be a member under Article 22. Clearly this cannot be the intention of the article and it is obvious that by a slip, "and" has been substituted for "or".'

9. In any event the Full Committee passed on 19th February, 1942, a resolution declaring the appellant a defaulter. The appellant did not carry out his engagements for a period of six months thereafter. By resolution dated 1st September, 1942, at a meeting of the Full Committee the appellant was expelled from the membership of the Exchange and it was resolved that his share shall stand forfeited.

10. There is no provision in the Indian Companies Act, 1913, which restricts the exercise of the right of the Exchange to forfeit shares, for non-payment of a call only. The Indian Companies Act, 1913, made no provision relating to forfeiture of shares. By section 17 (2) of the Act, a company could adopt the regulations contained in Table A in the First Schedule but the Company was not bound to do so. Regulations 24 to 30 of Table A dealt with the power and the procedure relating to forfeiture of shares. Regulation 24, it is true, provided for exercise of the power to forfeit a share when there was default in paying calls, but no inference follows therefrom that the share of a member could be forfeited only for non-payment of a call made in respect of the share which were not fully paid up.

11. In *The Calcutta Stock Exchange Association Ltd. v. S. N. Nundy & Co.*², Harris, C.J., after examining the provisions of the Companies Act, 1913, reviewed the decisions of the Courts in England and of the High Court of Calcutta and observed that the Indian Companies Act as well as the English Companies Act contemplate, recognize and sanction forfeiture

1. (1936) I.L.R. 63 Cal. 531.

2. I.L.R. (1950) 1 Cal. 235.

generally and not for non payment of calls only that a company may by its Articles lawfully provide for grounds of forfeiture other than non payment of call, subject to the qualification that the Articles relating to forfeiture do not offend against the general law of the land and in particular the Companies Act, and public policy, and that the forfeiture contemplated does not entail or affect a reduction in capital or involve or amount to purchase by the Company of its own shares nor does it amount to trafficking in its own shares. The Court in that case was concerned to determine the true effect of the Articles of the Exchange which fall to be interpreted in this case.

12 This Court in *Sri Gopal Jalan and Company v Calcutta Stock Exchange Association Ltd*¹, also considered whether forfeiture of shares resulted in reduction of capital contrary to the provisions of the Companies Act where power of forfeiture was given by the Articles for failure to carry out an undertaking or satisfy an obligation of the member to forfeit the shares. The Court in that case was interpreting the Articles which fall to be interpreted in this appeal. The Court held that the Exchange was not liable to file any return of the forfeited shares under section 75 (1) of the Indian Companies Act, 1936 when the same were re-issued. The Court observed that when a share is forfeited and re-issued there is no allotment, in the sense of application of shares out of the authorised and unappropriated capital, and approved the observation of HARRIS, C.J. in *S N Nundy's case*², that 'or such forfeiture all that happened was that the right of the particular shareholder disappeared but the share considered as a unit of issued capital continued to exist and was kept in suspense until another shareholder was found for it. In the view of this Court, the shares so forfeited may not be 'allotted' in the sense in which that word is understood in the Companies Act. The Court also pointed out that re-issue of forfeited shares is not allotment of the shares but only a sale for, if it were not so the forfeiture even for non payment of call would be invalid as involving an illegal reduction of capital.

13 Article 27 of the Exchange it may be recalled is in terms mandatory. The share forfeited to the Exchange must be re-allotted or otherwise disposed of; it cannot be retained by the Exchange. The share after forfeiture in the hands of the Company is subject to an obligation to dispose of it. On that account there is no reduction of capital by mere forfeiture.

14 Mr Datar appearing for the appellant however contended that in *Sri Gopal Jalan and Company's case*¹, the parties argued the case on the footing that Articles of Association of the Exchange were not invalid, whereas in the present case the validity of the Articles is challenged. But the Court in citing with approval the observations of HARRIS C.J. in *S N Nundy's case*², did in effect pronounce upon the validity of the Articles.

15 A forfeited share is, therefore, merely a share available to the Company for sale and remains vested in the Company for that purpose only. By forfeiting a share pursuant to the authority of the Articles of Association, no reduction of capital is achieved. We are unable to agree with Counsel for Sanyal that forfeiture of shares is permissible only in cases expressly contemplated by Table A—Model Articles 16, for non payment of calls in respect of a share which is not fully paid up.

16 Subject to the provisions of the Companies Act the Company and the members are bound by the provisions contained in the Articles of Association. The Articles regulate the internal management of the Company and define the powers of its officers. They also establish a contract between the Company and the members and between the members *inter se*. The contract governs the ordinary rights and obligations incidental to membership in the Company. In the absence of any provisions contained in the Indian Companies Act which prohibit a Company from forfeiting a share for failure on the part of the member to carry out an undertaking or an engagement the Articles of a Company which provide that in certain events membership rights of the shareholder including his

1 (1964) 3 S.C.R. 698 (1963) 2 Comp. L.J. 191 (1963) 2 S.C.J. 505
2 I.L.R. (1950) 1 Cal. 235

1 (1964) 3 S.C.R. 698 33 Comp. Cas. 862
(1963) 2 Comp. L.J. 198 (1963) 2 S.C.J. 505
2 (1950) I.L.R. 1 Cal. 235

right to the share will be forfeited are binding. The Articles of Association of the Exchange expressly provide that in the event of the member failing to carry out the engagement and in the conditions specified therein his share shall stand forfeited. Articles 22, 24, 26, 27 and 29 of the Exchange relating to forfeiture of shares in certain events are therefore valid.

17. There is in our judgment nothing in the procedure followed by the Sub-Committee and the Full Committee which rendered the forfeiture of Sanyal's share illegal. It is not in dispute that Sanyal incurred liability in favour of one of the members of the Exchange to pay Rs. 438-10-0 in the transaction relating to the sale of Indian Iron & Steel Company's shares and he failed to discharge that liability. He continued to remain in default for six months even after the resolution of the Full Committee, and on that account he ceased to be a member and his share was forfeited. The High Court has found that the copies of the letters dated 9th, 10th, 16th, 17th, and 20th December, 1941, and of 8th January, 11th and 19th February, 1942, were sent to Sanyal and the usual notices relating to the complaints placed before the Sub-Committee or the Full Committee were served upon Sanyal, that such notices were posted on the notice board of the Exchange that the appellant had opportunities at all stages of the proceedings to come before the Exchange and refute the charges made against him and that at no stage of the proceeding until 1st September, 1942, did Sanyal appear before the Sub-Committee or the Full Committee. The High Court was of the view that the order had not been made against Sanyal contrary to the rules of natural justice. It is true that Johurmull Daga complained about the default committed by Sanyal on 9th December, 1941, and the meeting of the Sub-Committee was held on 10th December, 1941. Granting that the letter of the Sub-Committee enclosing a copy of the complaint dated 9th December, 1941, sent by post to Sanyal may not have reached him because he had left Calcutta, he had still ample notice of the proceeding of the Sub-Committee because intimation was given to him by the notice posted on the board of the Exchange. Sanyal

raised no contention at any stage before the Sub-Committee or before the Full Committee that he had not received the notices of the meetings dated 10th December, 1941, 17th December, 1941, 7th January, 1942 of the Sub-Committee and of the meeting dated 19th February, 1942 of the Full Committee. Regularity of the proceedings of the Committees at the various meetings is not challenged before us. We are unable to agree with the contention raised by Counsel for Sanyal that the rules of natural justice were not complied with when the Sub-Committee and the Full Committee passed the impugned resolutions against Sanyal.

18. There is no substance in the plea that the Committee had no jurisdiction to order sale of the share forfeited. Article 27 declares that the forfeited share is the property of the Exchange and that the Committee of the Exchange shall sell, re-allot or otherwise dispose of the share, for satisfaction of all debts due by the member to the Association or to its members out of transactions in shares and stocks. Under its Articles the Exchange has authority to sell the share and to appropriate the sale proceeds towards satisfaction of the debts, liabilities or engagements.

19. But we are unable to agree with the view taken by the High Court that the balance of the amount remaining due after satisfying the liabilities of Sanyal remained the property of the Exchange and that Sanyal had no right thereto. Under the stipulations contained in Articles 21, 22, 24, the share of the defaulter or expelled member stands forfeited for failure to fulfil his obligation. The share of Sanyal by express resolution was forfeited. After applying the amount realised on sale of the share towards satisfaction of the debts, liabilities and engagements of Sanyal to the Exchange and its members, the balance remaining in the hands of the Exchange had to be held for and on behalf of the appellant. That is expressly provided by Article 33. The expression used in Article 29 "The forfeiture shall involve the extinction of all interest" is subject to those rights as by the Articles are saved, and Article 33 saves to the defaulting shareholder whose share is forfeited the right to the balance

remaining with the Exchange. Even assuming that Articles 24 and 31 reserve to the Exchange two distinct powers—the power to forfeit and the power to exercise a lien and that Article 33 only applies to sale in enforcement of a lien, and not to a sale under Article 27—we are of the view that the balance on hand after satisfying the liability of the defaulter must still be returned to the defaulting shareholder. The power to forfeit does not imply authority to appropriate the balance remaining in hand after satisfying the liabilities and obligations of the defaulter to the Exchange and its members. Any such implication would be contrary to the intent of section 74 of the Contract Act.

20 The power of the Exchange to forfeit the shares arise out of the Articles and its source is in contract. Forfeiture of share is in the nature of imposition of a penalty. Section 74 of the Indian Contract Act provides

“When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or as the case may be, the penalty stipulated for

* * * * *

21 In *Fateh Chand v Balkishan Das*¹, this Court in dealing with a case in which a claim for damages for breach of contract to sell a lien of immovable property arose, pronounced that the expression “the contract contains any other stipulation by way of penalty” comprehensively applies to every covenant involving a penalty—whether it is for payment on breach of contract of money, or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon Courts by section 74 of the Indian Contract

Act. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of a contract which expressly provides for forfeiture the Court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture. The same principles, in our judgment, would apply in the case in which there is a stipulation in the contract by way of a penalty, and the damages awarded to the party complaining of the breach will not in any case exceed the loss suffered by the complainant party. It was observed at page 526, in *Fateh Chand's case*¹

“The section (section 74) is clearly an attempt to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties a stipulation in a contract *in terrorem* is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.”

22 The Court also observed at page 530 “Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties predetermined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party, it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for

forfeiture of any property by way of penalty, the Court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated."

Granting that Article 33 deals with those cases in which lien alone is enforced and not in cases where forfeiture is levied, and the obligation of the defaulting shareholder is determined by Article 29, in our judgment, on the principle underlying section 74 of the Contract Act the Exchange had no right to hold out of the sale proceeds of the share any amount in excess of the amount due to it or to its members.

23. The Exchange may not purchase its own shares. If it does so, it amounts to reduction of capital. The legal theory of forfeiture is that a share forfeited is only taken over by the company with the object of disposing it of to satisfy its claim to enforce which the share was forfeited and all other obligations arising against him out of his membership. The company is given this right to recover the loss suffered by it by reason of the breach of contract committed by the shareholder. If the company is permitted to retain the balance of the amount after satisfying the debts, liabilities and engagements of the shareholder, the transaction would not be different from one purchasing the share of the defaulting shareholder for a value equal to the amount of his obligations. That would be plainly illegal. We are therefore unable to agree with the High Court that the Exchange was entitled to retain the balance after satisfying the debts, liabilities and engagements of the appellant to the other members or to the Exchange.

24. The decree passed by the High Court is set aside and the case remanded to the High Court for determining the extent of the liabilities of the appellant to the Exchange not only in respect of the transactions with Johurmull Daga but in respect of all other outstanding liabilities of the appellant to other members of the Exchange and to the Exchange which are enforceable under the Articles. The appellant is entitled to receive from the Exchange the balance remaining due after deducting the aggregate amount or value of the obligations. He will be

entitled to interest on the balance at the rate of 6 per cent. per annum from the date of the institution of the suit. Parties will bear their own costs throughout.

25. This appeal was filed *in forma pauperis*. The appellant will pay the court fee payable on the memorandum of appeal if he had not been permitted to appeal *in forma pauperis*.

V.K.

— Decree appealed from
set aside; Remitted to
High Court to determine the
liabilities of appellant.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction)

PRESENT.—*M. Hidayatullah, C.J., J. M. Shelat, G. K. Mitter, C. A. Vaidialingam and A. N. Ray, JJ.*

V. L. Rohlua

.. Petitioner*

v.

Deputy Commissioner, Aijal, Dist. Mizo
.. Respondent.

(A) *Armed Forces (Assam and Manipur) Special Powers Act (XXVIII of 1958), section 5—Scope.*

Under section 5 of the Armed Forces (Assam and Manipur) Special Powers Act, a person arrested under section 4 (c) had to be made over to the officer-in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest. What is the least possible delay in a case depends upon the facts, that is to say, how, where and in what circumstances the arrest was effected.

[Para. 7.]

(B) *Criminal Procedure Code (V of 1898)—Applicability to Mizo district.*

The Criminal Procedure Code is not applicable to the Mizo district by reason of the Sixth Schedule to the Constitution. Only the spirit of the Code applies.

[Para. 7.]

(Under Article 32 of the Constitution of India for a writ in the nature of *habeas corpus*).

* W.P. No. 238 of 1970.

29th September, 1970.

Hardev Singh, Advocate, *amicus curiae*,
(Petitioner was also produced in Court)
for Petitioner

Naamt Lal, Advocate for Respondent

The Judgment of the Court was delivered by

Hidayatullah, C J—The petitioner Rohlua has applied for his release by the issuance of a writ of *habeas corpus*. Previously he had applied to the High Court of Assam and Nagaland (Misc Criminal Case No 506 of 1969) but his petition was dismissed. The facts are as follows

The petitioner is admittedly an inhabitant of Bakupi in the Mizo District. He was arrested by the Armed Forces under section 4 (c) of the Armed Forces (Assam and Manipur) Special Powers Act 1958. He was handed over to the Civil Authorities on 2nd March, 1968. Since then two criminal cases have been started against him on 10th November, 1969 and 26th February, 1970. They cover a wide range of offences under the Assam Maintenance of Public Order Act, the Arms Act several sections of the Indian Penal Code, etc. The cases are pending against him.

2 The petitioner's complaint is that he was not informed of the grounds of his arrest and detention that no warrant was shown to him and that he was denied the right of making representations. His further grievance is that the cases have not been tried and he is held in illegal custody without obtaining proper remands from Magistrates.

3 These allegations are controverted in counter affidavits by Mr D B Poon the Additional Deputy Commissioner, Mizo District, Aijal. According to him the petitioner was arrested without warrant by the Armed Forces as is authorised under section 4 (c) of the Armed Forces (Assam and Manipur) Special Powers Act. The petitioner was informed of the grounds of his arrest and as soon as he was handed over to the Civil Authorities he was prosecuted for the offences. The petitioner was also given the grounds of detention along with the detention order on 9th May 1968. He could have represented to the Advisory Board but did not make a representation. Since then the petitioner made a confession

which is also exhibited in the case but as he is to be tried we do not refer to it here.

4 The State authorities have produced the order sheets from the cases. From them it appears that the petitioner was charged in the Court of the Additional District Magistrate on 3rd March, 1968 and was kept in judicial custody. He has since been remanded to jail custody from time to time. On 28th July, this Court in the *habeas corpus* petition ordered his production in Court and appointed Mr Hardev Singh Advocate as *amicus curiae*.

5 The petitioner then filed a second affidavit on 3rd August, 1970. In that Affidavit he has alleged that he was handed over to the civil authorities by the Armed Forces after 2 months from his arrest, his confessional statement was obtained at gun point, that no order was served on him under the Assam Maintenance of Public Order Act, 1953, that he was tortured, that the detention order was vague and that as the remand order expired on 18th July, 1970, his further detention became illegal.

6 In reply to this another affidavit has been filed by Mr D B Poon. According to him the petitioner was handed over to the civil authorities on 2nd March 1968 and the petitioner was produced before a Magistrate the very next day. The order of remand made on that day has been filed. The last order of remand was made on 20th June, 1970 and it was till 18th July, 1970. Since then another order of remand has been produced and the remand is to run till 28th September, 1970. During the time he has been in the custody of this Court there has been a break in the orders of remand as will appear presently. The Additional Deputy Commissioner also stated that owing to shortage of accommodation at Aijal Jail the petitioner was kept in Dibrugarh Jail till his production in this Court. In a supplementary affidavit the Additional Deputy Commissioner has explained that the petitioner was held for some time by the Armed Forces for interrogation at the Security Force Headquarters because of his connection with activities against the security of the State and his close association with the outlawed Mizo National Front Army and

with Pakistan, that before the last order of remand expired the petitioner was put in the custody of this Court and that now he is, again on a proper remand by the Magistrate in the original custody. The affidavit also states that the Criminal Procedure Code does not apply to the Mizo District and the spirit of the Code has been followed in this case, that the petitioner was produced before a Magistrate within the time prescribed by the Constitution and the Code of Criminal Procedure and that the remands, although of more than 15 days duration, were legal as there was no provision applicable and the requirements of this disturbed area justified slightly longer periods between each remand as jail conditions were difficult.

7. From the order-sheets produced before us it is clear that the petitioner was first produced before the Magistrate on 3rd March, 1968. That was roughly two months after his arrest by the Armed Forces. Under section 5 of the Armed Forces (Assam and Manipur) Special Powers Act, he had to be made over to the officer-in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest. What is the least possible delay in a case depends upon the facts, that is to say, how, where and in what circumstances the arrest was effected. From the affidavit of Mr. Poon, it *prima facie* appears that the petitioner is connected with the Mizo hostiles who are waging war against India. It was, therefore, necessary to question him about his associates, his stores of arms, and like matters. The difficulty of the terrain, the presence of hostile elements in the area must be considered in this connection. Although it seems to us that the Armed Forces delayed somewhat his surrender to the civil authorities, which is not the intention of the law, there is not too much delay. If the matter had arisen while the petitioner was in the custody of the Armed Forces a question might well have arisen that he was entitled to be released or at least made over to the police. However, that question does not arise now because he is an under trial prisoner. The only question is one of remand. Here too, if the matter had been for the application of the rules of the Code of

Criminal Procedure, no remand could have been longer than 15 days at a time. The fact of the matter, however, is that the Criminal Procedure Code is not applicable by reason of the Sixth Schedule to Constitution in this area. This was laid down in *State of Nagaland v. Rattan Singh*¹. Only the spirit of the Criminal Procedure Code applies. In this view of the matter we cannot insist on a strict compliance with the provisions of section 344 of the Code of Criminal Procedure. The petitioner had to be kept at Dibrugarh for want of space at Ayal Long distances, difficult terrain and hostile country, are considerations to take into account. The period each time was slightly longer than 15 days but not so unconscionably long as to violate the spirit of the Code. There was a gap when the petitioner was in the custody of this Court but no request was made for his release then. Now he is on a proper remand and in fact has been remanded to the custody of the Magistrate by us. We cannot now hold his detention to be illegal.

8. We see no reason to release him. The petition fails and will be dismissed.

V.K. ——— Petition dismissed.

THE SUPREME COURT OF INDIA.
(Civil Appellate Jurisdiction.)

PRESENT.—J. C. Shah and A. N. Grover, JJ.
Ramesh Chandra Chandiok and another
Appellants*

v:

Chuni Lal Sabharwal (dead) by his legal representatives and others Respondents.

(A) Specific performance—Agreement for the purchase of a plot—Earnest money—Balance to be paid within one month on the execution of the sale deed—Title of the vendor incomplete and sanction remained to be obtained from the Rehabilitation Ministry—Extension of the period for execution of the sale deed to obtain sanction—Subsequent cancellation of the agreement, if justified—Ready and willing to perform—Test.

The appellants entered into an agreement with the respondents for the purchase of

¹ I. (1966) 3 S C.R. 830

* C.A. No. 1776 of 1966. 12th October, 1970.

a plot allotted by the Rehabilitation Ministry to the respondents. A sum of Rs 7,500 was paid as earnest money of the purchase-money of Rs 22,500. The balance was to be paid on the execution of the sale deed by the respondents. It is significant that the lease deed was not executed in favour of the respondents by the Government until 21st May, 1956. According to the conditions of the lease the respondents were bound to obtain the sanction of the Rehabilitation Ministry before transferring the plot to any one else. The respondents were fully aware and conscious of this situation. On 11th August, 1955, it was agreed while extending the period for execution of the sale deed that the same shall be got executed after receipt of the sanction. The respondents further undertook to inform the appellants as soon as sanction was received and thereafter the sale deed had to be executed within a week and got registered on payment of the balance amount of consideration.

Held There was no question of time having ever been made the essence of the contract. So long as the vendor's own title was incomplete there was no question of the sale being completed. It is true that in the absence of agreement to the contrary, it is the purchaser who has to prepare the draft conveyance and submit it to the vendor for approval. No such point was raised at any prior stage and in any case, after the cancellation of the agreement by the respondents it was not incumbent on the appellants to send any draft conveyance. The very fact that they promptly filed the suit shows their keenness and readiness in the matter of acquiring the plot by purchase. The appellants had not only put in an advertisement in newspapers about the existence of the agreement but had also sent a letter on 12th September, 1956, declaring their willingness to pay balance of the purchase price on the respondents procuring the sanction. The appellants further made enquiries directly from the authorities concerned about the sanction. Readiness and willingness cannot be treated as a straight jacket formula. These have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. Therefore it has to be held that there was

nothing to indicate that the appellants at any stage were not ready and willing to perform their part of the contract.

[Paras 6 and 7]

(B) *Suit for specific performance of agreement to sell—Alternative relief for refund of part payment of price made and damages—Appeal against decree refusing specific performance but directing refund pending—Execution of decree and deposit of the amount by the defaulting vendor—Appeal if infructuous—Conduct of the party to be considered*

Because a statement was made at the Bar that during the pendency of the appeal against the decree refusing specific performance the appellants had executed the decree and the amount of Rs 7,500 had been deposited by the respondents pursuant to the execution proceedings the High Court held that the appellants were disentitled to a decree for specific performance. In appeal against the decision of the High Court,

Held It is true that the appellants could not accept satisfaction of the decree of the trial Court and yet prefer an appeal against the decree. That may well have brought them within the principle of election of remedies. [Para 8]

In the instant case however the above cannot apply because the appellants had, by consistent and unequivocal conduct made it clear that they were not willing to accept the judgment of the trial Court as correct. The conduct of the party is always an important element and it was not such that it precluded them from obtaining a decree for specific performance. [Paras 8, 9]

Appeal by Special Leave from the Judgment and Decree dated the 2nd December, 1964 of the Punjab High Court, Circuit Bench at Delhi in R.F.A. No 37 D of 1959

Bishan Narain, Senior Advocate (B. P. Maheshwari Advocate, with him), for Appellants

N. N. Keswani, Advocate, for Respondent No 2

C. B. Agarwala, Senior Advocate (Mrs. Urmila Kapoor, Advocate, with him), for Respondent No 3

The Judgment of the Court was delivered by

Grover, J.—This is an appeal by Special Leave from a decree of the Punjab High Court (Circuit Bench, Delhi).

2. On 18th July, 1955, the appellants entered into an agreement with the respondents for the purchase of plot No. 8 measuring 1500 square yards in Jangpura B, New Delhi for Rs. 22,500. The contract was evidenced by receipt Exhibit P-6 which was in the following terms:

"Received with thanks from Messrs. Ramesh Chandra Chandiok and Kailash Chandra Chandiok the sum of Rs. 7,500 (Rupees seven thousand and five hundred only) as earnest money of the purchase-money of Rs. 22,500 (Rupees Twenty-two thousand and five hundred) for the sale of Plot No. 8 measuring 1500 square yards in Jangpura B, purchased from the Rehabilitation Ministry and owned by us. The balance of Rs. 15,000 (Rupees fifteen thousand only) shall be paid to us by them within one month of the execution of this receipt on the execution of the sale deed by us in their favour'.

It is common ground that the aforesaid plot had been allotted by the Rehabilitation Ministry to the respondents and that its possession was to be delivered after payment of rent of lease-money up-to-date and after execution of the lease deed. The lease deed was actually executed in favour of the respondents on 21st April, 1956. Meanwhile on 11th August, 1955, the respondents wrote a letter to the appellants as follows:

"With reference to the receipt dated 18th July, 1955, executed by us in your favour, acknowledging receipt of Rs. 7,500 as earnest money for the sale of Plot No. 8 measuring 1500 square yards in Jangpura B owned by us and agreed to be sold to you by us, since it will take about a month more to obtain sanction of the Rehabilitation Ministry, the execution of the sale deed by us cannot be complete without the said sanction, it is hereby mutually agreed between us orally that the period for execution of the sale deed shall remain extended till the time of the receipt of the said sanction and

we hereby confirm the said oral agreement. We will inform you as soon as the said sanction is received and within a week thereof, we will execute the necessary sale deed in your favour and get the same registered against payment of the balance money. Please sign the duplicate of this letter in confirmation of the said oral arrangement".

A notice dated 15th June, 1956, was served by Counsel for the respondents on the appellants saying that the balance of consideration according to the terms of the agreement dated 18th July, 1955, was to be paid by the appellants and the sale deed was to be got registered within one month of 18th July, 1955. It was further stated that extension had been given as desired by the appellants but the balance amount had not been paid. In para. 3 it was stated "my clients are not prepared to wait indefinitely and therefore cancel your agreement for want of certainty and hereby give you an offer, without prejudice to their legal rights, to receive back the sum of Rs. 7,500 paid by you as earnest money less the amount of loss suffered by them on account of lease and interest etc. within one week of the receipt of this letter, failing which my clients would be entitled to forfeit the earnest money and treat the agreement cancelled".

3. A reply dated 22nd June, 1956, was sent by Counsel for the appellants in which reference was made to the letter dated 11th August, 1955 and it was pointed out that no information had been sent by the respondents about the sanction having been obtained from the Rehabilitation Ministry. The respondents were called upon to obtain the requisite sanction and to execute the sale deed against receipt of balance of purchase-money. On 4th July, 1956, Counsel for the respondents sent a reply saying that sanction had not been granted till then and inquiries made by respondents revealed that it might not be forthcoming for an indefinite period and that it was absolutely uncertain as to when it would be granted. It was claimed that the agreement had become void on account of uncertainty and without prejudice to their legal rights the respondents were prepared "*ex gratia*" to have the sale deed registered on payment of the

balance within a week of the receipt of the letter without waiting sanction of the Rehabilitation Ministry. On 11th November, 1956, the respondents are stated to have applied for sanction for transfer of the plot and it was granted on 20th November, 1956. The appellants had themselves made inquiries from the Housing and Rent Officer on 9th August 1956 to ascertain whether sanction had been granted and how much time it would take to accord the sanction. By a letter dated 27/29th November, 1956, the aforesaid officer informed the appellants that permission to transfer had been given on 20th November, 1956. The appellants had also taken steps to inform other prospective buyers about the existence of the agreement as they apprehended that the respondents intended transferring the same to some other party. On 29th July, 1956, an advertisement was published by them in the "Times of India" declaring the existence of the agreement entered into between the appellants and the respondents with regard to the sale of the aforesaid plot. On 4th December, 1956 the suit out of which the present appeal has arisen was filed by the appellants claiming specific performance of the contract dated 18th July, 1955 and in the alternative for refund of Rs. 7,500 being the amount of earnest money and Rs. 15,000 as damages together with interest.

4 Apart from taking all the necessary pleas it was averred in the plaint that the plaintiff appellant had always been ready and willing to perform their part of the contract. The suit was contested by the defendants respondents and among the material issues which were framed by the trial Court were the following:

(5) Whether the specific performance of the agreement in suit should be refused under section 21 or 22 of the Specific Relief Act?

(6) Whether the plaintiffs were ready and willing to perform their part of the contract?

The admitted case of the parties was that according to the conditions of the lease granted to the respondents, which had however, not been produced the transfer of the lease hold rights could be effected only with the sanction of the Rehabilitation Ministry. The trial

Court was of the opinion that in spite of this condition the respondents had a subsisting though defeasible interest in the lease hold rights which could very well be the subject matter of sale. It was held that the appellants did not perform the contract for about 1½ years even though the respondents had repudiated it much earlier. Any party to the contract could subsequently make time the essence of the contract by a reasonable notice and this had been done by the respondents by Exhibits P-8 and P-12, namely the letters dated 15th June, 1956 and 24th August, 1956. Issue No. 5 was thus decided against the appellants. On issue No. 6 the trial Court found that the appellant, were not ready and willing to pay the balance of consideration in accordance with the original agreement as they insisted on sanction of the Rehabilitation Ministry being obtained before the completion of sale though no such condition existed in the original contract. However, a decree was granted to the appellants in the sum of Rs. 7,500 on the ground that the same constituted part payment of consideration and was not liable to be forfeited. On 31st March, 1959 the appellants filed an application before the trial Court stating that they intended to prefer an appeal against the dismissal of the suit for specific performance but as the respondents were trying to dispose of the plot they should be restrained by an injunction from doing so. It appears that no injunction was granted by the Court. An appeal was filed to the High Court and, during the pendency of the appeal, the amount of Rs. 7,500 was deposited by the respondents in satisfaction of the decree passed by the trial Court. According to the respondents the appellants had taken out execution of the decree and it was for that reason that the said amount was deposited. It was not, however, withdrawn by the appellants during the pendency of the appeal.

5 The High Court found that both the respondents were bound by the letter Exhibit P-7 dated 11th August, 1955, to which reference has already been made. It was noticed that sanction of the Rehabilitation Ministry was required before the sale could be completed but it was held that there was nothing to indicate that the absence of such a sanction inval-

dated the transfer *ab initio* or rendered it void. In agreement with the trial Court the High Court held that even a defeasible interest could be the subject-matter of sale; in other words 'the sale could be effected without the sanction having been previously obtained. The view of the High Court was that Exhibit P-7 did not contain any such language which would justify the importing of a condition that until the respondents obtained sanction for the transfer of the property the appellants were not bound to get the sale completed. It was also decided that the appellants had not satisfactorily shown that they had sufficient funds to pay the balance amount' of Rs. 15,000 from which it could be concluded that they were not ready and willing to perform their part of the contract. Yet another point was decided 'against the appellants on the basis of certain' execution proceedings stated at the Bar to have been taken during the pendency of the appeal. According to the High Court once the appellants had obtained satisfaction of the decree for Rs. 7,500 they became disentitled to a decree for specific performance.

6. We are unable to concur with the reasoning or the conclusions of the High Court on the above main points. It is significant that the lease deed was not executed in favour of the respondents by the Government until 21st May, 1956. So long as their own title was incomplete there was no question of the sale being completed. It is also undisputed that according to the conditions of the lease the respondents were bound to obtain the sanction of the Rehabilitation Ministry before transferring the plot to any one else. The respondents were fully aware and conscious of this situation much earlier and that is the reason why on 11th August, 1955, it was agreed while extending the period for execution of the sale deed that the same shall be got executed after receipt of the sanction. The statement contained in Exhibit P-7 that that the execution of the sale deed "by us cannot be complete without the said sanction" was unqualified and unequivocal. The respondents further undertook to inform the appellants as soon as sanction was received and thereafter the sale deed had to be executed

within a week and got registered on payment of the balance amount of consideration. We are wholly unable to understand how in the presence of Exhibit P-7 it was possible to hold that the appellants were bound to get the sale completed even before any information was received from the respondents about the sanction having been obtained. It is quite obvious from the letter Exhibit P-8 dated 15th June, 1956, that the respondents were having second thoughts and wanted to wriggle out of the agreement because presumably they wanted to transfer it for better consideration to someone else or to transfer it in favour of their own relation as is stated to have been done later. The respondents never applied for any sanction after 11th August, 1955 and took up the position that they were not prepared to wait indefinitely in the matter and were therefore cancelling the agreement for want of certainty. We are completely at a loss to understand this attitude nor has any light been thrown on the uncertainty contemplated in the aforesaid letter. It does not appear that there would have been any difficulty in obtaining the sanction if the respondents had made any attempt to obtain it. This is obvious from the fact that when they actually applied for sanction on 11th November, 1956, it was granted after almost a week. The statement contained in Exhibit P-10 dated 4th July, 1956, that the sanction was not forthcoming has not been substantiated by any cogent evidence as no document was placed on the record to show that any attempt was made to obtain sanction prior to 11th November, 1956. Be that as it may the respondents could not call upon the appellants to complete the sale and pay the balance money until the undertaking given in Exhibit P-7 dated 11th August, 1955, had been fulfilled by them. The sanction was given in November, 1956 and even when the respondents did not inform the appellants about it so as to enable them to perform their part of the agreement of sale. There was no question of time having ever been made the essence of the contract by the letters sent by the respondents nor could it be said that the appellants had failed to perform their part of the agreement within a reasonable time.

7 On behalf of the respondents it has been urged that in spite of the letters of the respondent by which the agreement had been cancelled the appellants did not treat the agreement of sale as having come to an end and kept it alive. They were, therefore, bound to send a draft of the conveyance and call upon the respondents to execute the sale deed and get it registered on payment of the balance of the sale price as soon as they came to know directly from the Housing and Rent Officer that sanction had been granted. Thus they failed to do and it must be inferred that they were not ready and willing to perform their part of the agreement. Our attention has been invited to a statement in Halsbury's Laws of England, Volume 34, Third edition at page 339 that in the absence of agreement to the contrary it is the purchaser who has to prepare the draft conveyance and submit it to the vendor for approval. No such point was raised at any prior stage and in any case we do not consider that after the cancellation of the agreement by the respondents it was necessary or incumbent on the appellants to send any draft conveyance. The very fact that they promptly filed the suit shows their keenness and readiness in the matter of acquiring the plot by purchase. It must be remembered that the appellants had not only put in an advertisement in newspapers about the existence of the agreement but had also sent a letter Exhibit P 13 on 12th September, 1956, declaring their readiness and willingness to pay the balance of the purchase price on the respondents procuring the sanction. The appellants further made enquiries directly from the authorities concerned about the sanction. Readiness and willingness cannot be treated as a straight jacket formula. These have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. In our judgment there was nothing to indicate that the appellants at any stage were not ready and willing to perform their part of the contract. The High Court had taken another aspect of readiness and willingness into consideration, namely, the possession of sufficient funds by the appellants at the material time for payment of the balance of the sale price. Ramesh

Chandra PW 6 had stated that his father was a Head Master since 1922 in a High School and he was also doing import business. He gave up service in 1934. The son joined the father in his business in the year 1928 and his other brother appellant No 2 also joined that business some years ago. The bank account was produced which showed that between 18th July, 1955 and 31st December, 1955, the appellants' father had in his account a credit of over Rs 15,000 but thereafter between January, 1956 and March, 1956, an amount of Rs 16,000 odd had been withdrawn. According to the High Court after these dates there was nothing to show that the appellants had any funds. The evidence of Ramesh Chandra PW 6 that the family had an amount of Rs 40,000 lying at the house was not believed. Now in the first place the relevant period for determining whether the appellants were in a position to pay the balance of the sale price was after November, 1956, when sanction had been obtained by the respondents for transfer of the plot from the Rehabilitation Ministry. The appellants had admittedly paid without any difficulty Rs 7,500 as earnest money and the bank account of the father showed various credit and debit entries from time to time. On 5th March, 1956 an amount of Rs 12,720 had been withdrawn by a cheque in favour of Ramesh Chandra PW 6. According to his statement this amount was withdrawn because his father was very ill and it was decided to withdraw the amount at that time. It was deposited with his mother and remained with her throughout. There is no material or evidence to show that this amount had been expended or spent and that the statement of Ramesh Chandra was false on the point. Even if the version that Rs 40,000 in cash were lying at the house of the appellant is discarded at least an amount of Rs 12,720 must have been available at the material and relevant time. The appellants were carrying on business and there is nothing to indicate that they were not in a position to arrange for the remaining sum to make up the total of Rs 15,000. We are, therefore, unable to accept that the appellants, who had all along been trying their utmost to purchase the plot, did not have the necessary funds or

could not arrange for them when the sale deed had to be executed and registered after the sanction had been obtained.

8. Coming to the last point, the High Court has held that the appellants were disentitled to a decree for specific performance because a statement was made at the Bar that during the pendency of the appeal they had executed the decree of the trial Court and an amount of Rs. 7,500 had been deposited by the respondents pursuant to the execution proceedings. It is true that the appellant could not accept satisfaction of the decree of the trial Court and yet prefer an appeal against that decree. That may well have brought them within the principle that when the plaintiff has elected to proceed in some other manner than for specific performance he cannot ask for the latter relief. This is what Scrutton, L.J., said in *Dexters Ltd. v. Hill Crest Oil Company Bradford Ltd.*¹, at page 358:

"So in my opinion, you cannot take the benefit of a judgment as being good and then appeal against it as being bad".

It was further observed:

"It startles me to hear it argued that a person can say the judgment is wrong and at the same time accept payment under the judgment as being right".

This illustrates the rule that a party cannot approbate and reprobate at the same time. These propositions are so well known that no possible exception can be taken to them. In the present case, however, the above rule cannot apply because the appellants had, by consistent and unequivocal conduct, made it clear that they were not willing to accept the judgment of the trial Court as correct. It has already been mentioned at a previous stage that after the decision of the trial Court the appellants had even applied on 31st March, 1958, for an injunction restraining the respondents from selling or otherwise disposing of the plot as it was apprehended that they were trying to do so. It was stated in this application that the plaintiffs would

be preferring an appeal but it would take time to secure certified copies. An appeal was in fact preferred and seriously pressed before the High Court on the relief relating to specific performance.

9. This relief is discretionary but not arbitrary and discretion must be exercised in accordance with the sound and reasonable judicial principles. We are unable to hold that the conduct of the appellants, which is always an important element for consideration, was such that it precluded them from obtaining a decree for specific performance.

10. It is common ground that the plot in dispute has been transferred by the respondents and therefore the proper form of the decree would be the same as indicated at page 369 in *Lala Durga Prasad and another v. Lala Deep Chand and others*¹ viz., "to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff". We order accordingly. The decree of the Courts below is hereby set aside and the appeal is allowed with costs in this Court and the High Court.

V.M.K.

*Appeal allowed;
Specific performance directed
in the manner specified*

¹ (1954) S.C.J. 23; (1954) 1 M.L.J. 60; (1954) S.C.R. 360.

1. L.R. (1926) 1 K.B. 348, 358.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — 4 *N Ray* and 1 *D Dua*, JJ

The State of Assam and others

Appellants*

Premadhar Baruah and others Respondents

Superannuation—Fundamental rule 56 (a)—Assam Government Memorandum issued on 21st March, 1963—If creates any right in a Government servant—Paragraph 4 thereof if violative of Article 14 of the Constitution—Subsequent Memorandum dated 2nd April, 1968—Effect

Memorandum (Order) dated 21st March, 1963, was an executive instruction. It has to be read in the light of the Order, dated 2nd April, 1968, as also in relation to Fundamental Rule 56 (a). After the Order of 2nd April, 1968 came into effect the prior Order, dated 21st March, 1963, is neither relevant nor effective.

[Para 9]

Both the above Orders are executive instructions, they are not rules under Article 309 of the Constitution. [Para 11]

A Government servant has no right to continue in service beyond the age of superannuation (after the age of 55 years). A Government servant is retained beyond the age of superannuation when the Government in the exigencies of public service or on public grounds exercises its discretion to retain a Government servant in service after the age of superannuation. The scope for the exercise of this discretion is embodied in Fundamental Rule 56 (a) as well as in paragraph 4 of 21st March, 1963 memorandum. [Paras 10 and 17]

The 1963 notification treated all Government servants alike, namely, that they could be retained beyond the age of superannuation, but such retention depended upon the exigencies of the public service and the consideration of physical fitness and efficiency. Therefore it could not be said that the memorandum of 1963 infringed Article 14. [Para 18]

* CAs Nos 1334 to 1336 of 1969

4th May, 1970

The High Court fell into the error of overlooking that the 21st March, 1963, memorandum no longer occupied the field after the supersession of that memorandum by the memorandum dated 2nd April, 1968. [Para. 19]

Further, paragraph 4 of the memorandum dated 21st March, 1963, has been overlooked by the High Court. Paragraph 4 of the memorandum flowed from Fundamental Rule 56 (a). The Government could retain a Government servant beyond the age of superannuation. The Government has also the discretion to withdraw such retention in service because the retention does not confer any right on the Government servant.

[Para 20]

Appeals from the Judgment and Order dated the 28th March, 1969 of the Assam and Nagaland High Court in Civil Rules Nos 308, 316 and 323 of 1968.

Niren De, Attorney General for India (*Naum Lal* and *S N Choudhury*, Advocates, with him), for Appellants (In all the Appeals)

Sarjoo Prasad, Senior Advocate (*D D Choudhury*, Advocate, and *M M Kshatriya* and *G S Chatterjee*, Advocates of *M/s Kshatriya and Chatterjee*, with him), for Respondent No 1 (In C.A No 1334 of 1969)

S P Nayar, Advocate, for Respondent No 4 (In C.A No 1334 of 1969)

The Judgment of the Court was delivered by

Ray, J—These three appeals by certificate are against the judgment, dated 28th March, 1969, passed by the High Court for the State of Assam and Nagaland holding by a majority judgment that the three main respondents in the three appeals, namely, Premadhar Baruah, Rashadhar Bora and Premadhar Dutta, are deemed to have continued in service of the Government and the orders terminating extension of service after attaining the age of 55 on three months notice pursuant to paragraph 4 of the Memorandum dated 21st March, 1963, are bad in law.

2 On 21st March, 1963, the Assam Government issued a memorandum which was contained in 7 paragraphs. In paragraph 1 of the memorandum it was

stated that it was decided that the age of compulsory retirement of State Government servants should be 58 years. In paragraph 2 of the memorandum it was stated that the decision would apply to all Government servants who would retire on or after 1st December, 1962. Government servants who were on leave preparatory to retirement on 1st December, 1962, would also be entitled to this benefit but Government servants who were on refused leave from a date prior to 1st December, 1962, would not be entitled to the benefit nor would the benefit apply in case of Government servants who reached the age of superannuation on a date prior to 1st December, 1962, having been allowed extension of service. In paragraph 3 of the memorandum it was stated that no Government servant would be entitled to the benefit of the increased age of compulsory retirement unless he had been permitted to continue in service after the age of 55 years after the appointing authority was satisfied that he was efficient and physically fit for Government service. In paragraph 4 of the memorandum it was stated,

"Notwithstanding anything contained in the foregoing paragraphs, the appointing authority may require a Government servant to retire after he attained the age of 55 years on three months' notice without assigning any reason".

3. The respondent Premadhar Baruah was born on 1st January, 1913. He was appointed as a typist in the employment of the Government on 18th August, 1941. On 6th May, 1946, he was confirmed as an Assistant Auditor. On 1st April, 1950, he was confirmed as Auditor Local Accounts. Under Fundamental Rule 56 (a) his date of retirement would be 1st January, 1968, on attaining the age of 55 years. On 21st December, 1967, there was an order asking respondent Premadhar Baruah to continue till further orders.

4. On 2nd April, 1968, the Government issued another memorandum which was contained in three paragraphs. In the first paragraph it was stated that the Government had decided that the age of compulsory retirement of State Government servants should be 55 years as laid down in Fundamental Rule 56 (a) dis-

continuing the benefit of raising the age of superannuation to 58 years as laid down in the office memorandum, dated 21st March, 1963. In the third paragraph it was said that this decision would apply to all Government servants who would retire on or after 30th September, 1968, and Government servants who were already on extension beyond 55 years of age should be served with a three months' notice without assigning any reason as envisaged in the Government Order, dated 21st March, 1963, to retire on 30th September, 1968.

5. Thereafter on 7th May, 1968, notice was given by the Government to respondent Premadhar Baruah. The notice was as follows:—

"No VI/1/68-69-13 dated, Gauhati, the 7th May, 1968.

To

Sri Premadhar Baruah,

Designation-Auditor, Local Accounts, Address, Gauhati.

In pursuance of office memorandum No. AAP. 217/62/15, dated 21st March, 1963, read with O.M. No. AAP. 126/67/64, dated 2nd April, 1968, you are hereby requested to take notice that you shall not be retained in service beyond 30th September, 1968.

This may be treated as a notice under para. 4 of O.M. No. AAP. 217/62/15, dated 21st March, 1963.

Sd./- J. Sarmah,

Designation, Examiner of Local Account, Gauhati, Address, Gauhati.

6. On these allegations respondent Premadhar Baruah, asked for orders as to why the notice, dated 7th May, 1968, terminating the respondent's services on 30th September, 1968, should not be quashed.

7. The respondent Premadhar Baruah raised three contentions before the High Court. First, that under paragraph 4 of the memorandum, dated 21st March, 1963, three months' notice could be given only before an employee reached the age of 55 years and not thereafter. Secondly,

that the compulsory retirement permitted by the fourth paragraph of the memorandum of 21st March, 1963, amounted to removal contravening the provisions of Article 311 of the Constitution. Thirdly, compulsory retirement under the said fourth paragraph of the memorandum of 1963, by giving three months' notice without assigning any reason is violative of Article 14 of the Constitution. The High Court by majority decision upheld only the third contention of the respondent that an unfettered power was given to the appointing authority to retire Government servants after attaining the age of 55 years by giving three months' notice terminating their services.

8 It is necessary to keep in the forefront Fundamental Rule 56 (a) which is as follows —

Fundamental Rule 56 (a)—The date of compulsory retirement of a Government servant is the date on which he attains the age of 55 years. He may be retained in service after this age with the sanction of the State Government on public grounds which must be recorded in writing, and proposals for the retention of a Government servant in service after this age should not be made except in very special circumstances.

9 The first question is whether the respondents can found any right on the order of 21st March, 1963. Counsel for the respondent contended that the order dated 21st March, 1963 was acted upon in relation to respondent Premadhar Baruah and he had been given an extension upto the age of 58 years and therefore he could not be asked to retire before that age. The order dated 21st March, 1963 was an executive instruction. That order of 21st March, 1963 has to be read not only in the light of the order dated 2nd April, 1968, but also in relation to Fundamental Rule 56 (a). The memorandum of 2nd April, 1968, definitely stated that the benefit of raising the age of superannuation to 58 years as laid down in the office memorandum dated 21st March, 1963, had been decided to be discontinued by the memorandum dated 2nd April, 1968. After the order dated 2nd April, 1968, came into existence the order of 21st March, 1963, is neither relevant nor effective.

10 Under Fundamental Rule 56 (a) a Government servant may be retained in service after the age of 55 years and such retention shall not be made except in special circumstances. It, therefore, follows that even according to Fundamental Rule 56 (a) no legal right can be said to exist in relation to any Government servant to continue in service after the age of 55 years. It is a discretion which the Government will exercise in some cases. Fundamental Rule 56 (a) is in two parts. The first part is that the date of compulsory retirement of a Government servant is the date on which he attains the age of 55 years. The second part is that the retention of the Government servant in service after attaining the age of 55 years should not be made except in special circumstances. Such a rule cannot be said to found any right in any employee to continue in service after the age of 55 years.

11 The order, dated 21st March, 1963, and the order dated 2nd April, 1968, are both executive instructions and they are not rules under Article 309 of the Constitution.

12 In *I N Saksena v State of Madhya Pradesh*¹, the Government of Madhya Pradesh issued a memorandum on 28th February, 1963, raising the age of retirement from 55 to 58 years. Clause 5 of the memorandum there said that the appointing authority might require a Government servant to retire after he had attained the age of 55 years without assigning any reason. The appellant in that case was given an extension beyond the age of 55 years. He had attained the age of 55 years in the month of August, 1963. Thereafter in the month of September, 1963, it was communicated to him that he was to retire on 31st December, 1963. On 29th November, 1963, a notification was issued by the Madhya Pradesh Government which was published in the Gazette on 6th December, 1963, whereby under Article 309, Fundamental Rule 56 in place of the old one was amended to the effect that the date of compulsory retirement of a Government servant, other than a Class IV employee, was the date on which he attained the age of 58 years. Only Scientific and Technical personnel might be retained in service.

after the age of compulsory retirement with the sanction of the competent authority subject to their fitness and suitability for work, but they should not ordinarily be retained beyond the age of 60 years. The date of retirement of a Class IV Government servant was the date on which he attained the age of 60 years. The new rule came into effect from 1st March, 1963.

13. The most noticeable feature in the Madhya Pradesh case was that the amended Fundamental Rule No. 56 did not contain any power of the appointing authority to require a Government servant to retire compulsorily after the age of 55 years without assigning any reason though such a power was to be found in the order dated 28th February, 1963. On this ratio it was held in *Saksena's case*¹, that Fundamental Rule 56 published on 6th December, 1963, was the only rule applicable to Saksena and therefore the notice which had been given in the month of September, to retire him with effect from the afternoon of 31st December, 1963, could not be upheld. The implication of the Madhya Pradesh decision is that there could be an order extending the services of the Government servant by general order and if an order contained a power to retire a person after the age of 55 years without assigning any reasons such a power was valid and defensible.

14. In *Bishun Narain Mishra v. State of Uttar Pradesh and others*², it was held that there was no provision to prevent the Government from taking away the power of the Government to increase or reduce the age of superannuation and such termination of service because of the reduction of age of superannuation could not be said to amount to removal within the meaning of Article 311. As to challenging the rule on the ground of discrimination it was held that the rule treated alike those who were between the age of 55 and 58 years. Those who were retired on 31st December, 1961, were in different ages but that was so because, their services were retained for different periods beyond the age of 55 years. Wanchoo, J., speaking for the Court said:

"It cannot be urged that if Government decides to retain the service of some public servants after the age of retirement it must retain every public servant for the same length of time. The retention of public servants after the period of retirement depends upon their efficiency and the exigencies of public service".

15. In *Moti Ram Daka etc. v. General Manager, N. E. F. Railways, Maligaon, Pandu, etc.*¹, the services of railway servants were terminated under rules 148 (3) and 149 (3) of the Indian Railway Establishment Code. Broadly stated, rules 148 (3) and 149 (3) provided that the service of non-pensionable railway servants under rule 148 (3) and of other railway servants under rule 149 (3) was liable to termination on notice on either side for the period shown in the Rules but no notice was required in case of dismissal or removal as a disciplinary measure after compliance with Article 311 (2) of the Constitution and retirement on attaining the age of superannuation and termination of service due to mental or physical incapacity. The majority decision was given by Gajendragadkar, J. Two separate opinions were given by Subba Rao and Das Gupta, JJ., Shah, J., gave a dissenting opinion.

16. In *Moti Ram Daka's case*¹, rule 148 (3) was alleged to violate Article 14 on the grounds that the rule gave no guidance to the authorities who would take action on it as regards the principle to be followed in exercising power and secondly that the rule discriminated between railway servants and other public servants. Das Gupta, J., was of the view that the rule did not lay down any principle or policy for guiding the exercise of discretion by the authority who would terminate the service in the matter of selection or classification. It was said that arbitrary and uncontrolled power was left with the authority to select at its will any person against whom action would be taken and therefore the authority could discriminate between two railway servants to both of whom rule 148 (3) equally applied by taking action in one case and not taking it in the other. Shah, J.,

1. (1967) 2 S.C.R. 496.

2. (1965) 2 S.C.J. 718; (1965) 1 S.C.R. 693.

1. (1964) 5 S.C.R. 683.

on the other said that if for the purpose of ensuring the interests and safety of the public and the State power was reserved to the Railway Administration to terminate the employment under the Railways it could not be said that the railway servants were singled out for a special or discriminatory treatment. The classification could be founded on an intelligible differentia distinguishing railway servants from others and such differentia had a rational relation to the objects to be achieved. With regard to the position of railway servants *inter se* Shah, J., said that if the employment was for a period defined or if the employment was till superannuation the Rules contemplated termination of service by a notice in both cases. The Rule would therefore not deny equal protection because there was no discrimination between them and the same law which protected other servants in the same group protected the appellants in that case and also provided for determination of their employment. Shah J., further said that the possibility or assumption of *mala fide* exercise of a power of determination of employment under rule 148 (3) could not be the correct method of testing the constitutionality of the rule.

17 In the present appeals, the High Court by its majority decision held that paragraph 4 of the memorandum of 21st March, 1963, offended Article 14 of the Constitution because a person who was physically fit and efficient was allowed to continue in service till he was 58 years of age whereas any other person who would satisfy the conditions of physical fitness and efficiency could be asked to retire on three months' notice. It has to be appreciated first that a Government servant has no right to continue in service beyond the age of superannuation. A Government servant is retained beyond the age of superannuation when the Government in the exigencies of public service or on public grounds exercises its discretion to retain a Government servant in service after the age of superannuation. The scope for the exercise of this discretion is embodied in Fundamental Rule 56 (a) as well as in paragraph 4 of 21st March 1963 memorandum which was challenged in the High Court to be an infraction of Article 14.

18 In the present case after 21st March, 1963 memorandum was superseded and abrogated by 2nd April, 1968 memorandum the respondents could not draw any sustenance from 21st March, 1963 memorandum. 2nd April, 1968 memorandum reduced the age of superannuation and withdrew the benefits which had been conferred by 21st March, 1963 memorandum. This was again done in the interest of the Government servants to prevent unemployment as a result of increase of age of superannuation. This Court in *Bishun Narain Mishra's case*¹, in dealing with a notification directing all those who were between the age of 55 and 58 and had been retained in service could be retired on 31st December, 1961, said that the rule treated alike all those who were between the age of 55 and 58 years. In the present appeals, the 1963 notification treated all Government servants alike, namely, that they could be retained beyond the age of superannuation but such retention depended upon the exigencies of the public service and the consideration of physical fitness and efficiency. Therefore it could not be said that the memorandum of 1963, infringed Article 14.

19 The High Court fell into the error of overlooking that 21st March, 1963 memorandum no longer occupied the field after the supersession of that memorandum by the memorandum dated 2nd April, 1968. Furthermore, if the order dated 21st March, 1963, was found to be bad the entire order was to be struck down for the obvious reason that if the instrument was within the vice of Article 14 of the Constitution the entire notification would perish.

20 We are of opinion that the High Court was in error in overlooking paragraph 4 of the memorandum dated 21st March 1963. Paragraph 4 was as follows —

"Notwithstanding anything contained in the foregoing paragraphs the appointing authority may require a Government servant to retire after he attained the age of 55 years on three months' notice without assigning any reason."

As we have already indicated paragraph 4 of the memorandum flowed from Fundamental Rule 56 (a). The Government could retain a Government servant beyond the age of superannuation. The Government has also the discretion to withdraw such retention in service because the retention does not confer any right on the Government servant.

21. Civil Appeal No. 1335 of 1969 relates to the case of Rasodhai Bora and Civil Appeal No. 1336 of 1969 is that of Premadhar Dutta.

22. Rasodhar Bora was born on 1st January, 1913 and would have retired on 1st January, 1968, on completion of the age of 55 years. He was found to be physically fit and efficient by the competent authorities and he was allowed to continue in service after the age of 55 years. Thereafter by a notice dated 1st July, 1968, there was a termination of his service on 30th September, 1968.

23. In Civil Appeal No. 1336 of 1969 Premadhar Dutta was born on 15th May, 1911, and he was due to retire on 15th May, 1966. He continued in service after reaching the age of 55 years. His service was terminated on 30th May, 1968, by a notice dated 28th May, 1968.

24. The contentions of both the respondents were similar to that of Premadhar Baruah.

25. For these reasons, the appeals are accepted. The majority judgment is set aside. In the fact and circumstances of the case we direct that the parties will pay and bear their own costs.

K.G.S. ————— Appeals allowed.

THE SUPREME COURT OF INDIA.
(Civil Appellate Jurisdiction.)

PRESENT:—S. M. Sikri and A. N. Ray, JJ.

Luka Mathai (dead) by legal representative
... Appellant*

v.

Neelakanta Iyer Subramonia Iyer
... Respondent.

(A) *Travancore Revenue Recovery Regulation (I of 1068 M.E.)*, section 32 (2)—*Requisites under satisfied—Misdescription of Survey No. only of property—Identity of property known to concerned parties—If 'no proclamation'—No proof of sale for a very low and inadequate price—Sale if liable to be set aside.*

In this appeal with certificate of the High Court of Kerala the appellant raised the following contentions :

(1) The revenue sale was a nullity because in effect and substance there was no proclamation of sale inasmuch as instead of the proper Survey Nos. 545/32-A1 and 537/3 incorrect Survey Nos. 545/32, II-1 and 532/3 were given ;

(2) that the property valued at 1,00,000 had been sold for a meagre sum of Rs. 4,510 ;

(3) that under the Travancore Revenue Recovery Regulation this property could not be brought to sale ; and

(4) that the Government had no authority to sell items of properties not given as security under the bonds ; as such the sale of all the properties are void.

Held, the finding of the High Court that an error in the Survey number of the property involved in a proclamation of sale cannot be held to be such a vital defect as to compel the Court to hold the sale to be one 'without a proclamation' at all and to declare the sale void on that score, especially in view of the fact that, even according to the plaintiff, nobody was misled by that error, is the only finding that could be arrived at on the material on record.

[*Paras. 10, 11.*]

The proclamation satisfies all the requirements under section 32 (2) of the Travancore Revenue Recovery Regulation. It is clear from the details mentioned in the proclamation, that the bidder, the owner and the auctioneer had no doubt about the identity of the property which was being sold. This was not a case of non publication of the proclamation.

{Paras 13 and 14 }

There is no material to show that the value of the property was more than Rs 30,000. In view of the fact that the property had been mortgaged to Government and to private parties, it cannot be said that the property was sold at a low price. The Trial Court has found that no fraud has been proved.

{Para 16 }

The respondent has not been able to point out any such agreement that the amounts due under the bonds can be recovered as arrears of revenue, and the only point he urges is that this point was new and should not be allowed to be taken. No other regulation has been brought to our notice which makes dues under this bond to be recoverable as arrears of public or land revenue. But it is not possible to set aside the sale on this ground because if the point had been taken at an early stage the Government may well have relied on the power of sale given under the bond. The fact that the sale took place under the machinery provided by the Revenue Regulation and not under any *ad hoc* machinery set up by the Government would not vitiate the sale. {Para 19 }

(B) *Revenue Sale—Security bonds in favour of Government—Power to sell only the properties secured—Secured as well as other properties sold—Whole sale is void*

The bonds do not give power to the Government to sell the properties other than those mentioned in the bond. The properties mentioned in plaint A schedule items 2 to 5, B schedule items 1 and 3 to 8 and C schedule items were not given as security under the bond and the Government had no authority to sell them. It is conceded on behalf of the respondent that all the properties were sold in one lot. This vitiates the whole sale and so, there is no option but to declare that the sale of all the properties was void. {Para 20 }

Appeal from the Judgment and Decree dated the 24th January, 1964 of the Kerala High Court in Appeal, Suit No 368 of 1959

M C Chagla, (Senior Advocate, Ganpat Rai and Manuel T Paikedy, Advocates, with him), for Appellant

A R Semanatha Iyer, Senior Advocate, (N Narayanaswami, K N Bhat and M R A Pillai, Advocates, with him), for Respondent

The Judgment of the Court was delivered by

Sikri, J.—This appeal by certificate granted by the High Court of Kerala is directed against its judgment and decree reversing the judgment and decree of the trial Court and dismissing the suit of the original plaintiff, appellant before us. The relevant facts for determining the points raised before us by Mr Chagla, learned Counsel for the appellant, are as follows

2 On 5th December, 1931, the plaintiff executed a hypothecation bond in favour of the Travancore Government in respect of a loan of Rs 6,000. On 12th December, 1931, another bond was executed in respect of a further loan of Rs 4,400. On 22nd May, 1932, the plaintiff executed another hypothecation bond in favour of the father of Neelakanta Iyer Subramonia Iyer, respondent before us. In the Government gazettes dated 21st February, 1939 and 25th April, 1939, under paragraph 6 reference is made to the arrears of Rs 4,193 Chs 19 c 9 plus interest under the special loan to be paid by Luka Mathai of Pallathanathu, Kottayam Taluk, and the sale of 97 acres of nilam comprised in Survey No 545/32-11/1 and 14 cents of *puravidam* comprised in Survey No 532/3

3 A notice was issued to the plaintiff in March or April, 1939, (27th Meenam, 1114 ME) that as he had to repay Rs 4,193 chs 19 c 9 under the special loan plus the execution costs and the interest thereon "it is hereby made known that 107 acres 84 cents of properties belonging to you and comprised in Survey Nos 545/32-11/1, 481/3 481/4 A, 481/4-C etc of Pulunkunnu Pakuthy and which were attached will be sold in auction on 27th Medam, 144. On 10th May, 1939, the revenue auction took place and the respondent purchased the properties in dispute for Rs 4,510. The plaintiff presented a petition (Ext M) to the Division Peshkar against

the revenue sale. In this petition it was stated as follows:

"I received notice stating that the sum will be realised by auctioning that the aforesaid property in survey No. 545/32 A-1, 481/5, 481/4-A, 481/4-C of Pulinkunnu Pakuthy. Knowing that the aforesaid property in survey No. 545/32 A-1, which belongs to me and which I had given as security to Government was going to be sold in auction on 27th Medam last, many persons had come forward to bid the same in auction. But the properties that were sold in auction are the properties comprised in survey Nos. 545/32/11/2, 481/5, 481/4-A and 481/4-C".

He further stated that "since the auction was conducted in this manner the properties worth about Rs. 30,000 were sold in this auction for a paltry sum of Rs. 4,500 odd."

4. The sale was, however, confirmed by the Division Peshkar. The sale certificate (sanad) was issued to the respondent on 13th November, 1939. The sale certificate was executed and issued under section 34 of Regulation I of 1068, in respect of the properties including the properties in dispute, namely, 97 acres of *nilam* comprised in survey No. 545/32 A-1 and 14 cents of *puravidam* comprised in survey No. 537/3.

5. On 5th August, 1941, partition suit (O.S. No. 102 of 1116), was instituted and judgment was delivered by the Trial Court in this suit on 29th September, 1952. Reference is made to this judgment because basing itself on this judgment the plea of *res judicata* was raised by the defendant in the High Court.

6. The suit out of which the present appeal arises, namely, original suit No. 492 of 1953, was filed for setting aside the sale and redemption of the mortgage. The Trial Court partly decreed the suit holding that the sale was a nullity. The High Court, as stated earlier, has reversed this judgment and dismissed the suit.

7. The learned Counsel for the appellant raised the following points before us: (1) that the revenue sale was a nullity because in effect and substance no proclamation of sale was issued inasmuch

as instead of mentioning the proper revenue numbers of the land, namely, survey No. 545/32 A-1, survey No. 545/32-II/1 was mentioned and in place of mentioning survey No. 537/3, survey No. 532/3 was mentioned; (2) that the property valued at Rs. 1,00,000 had been sold for a meagre sum of Rs. 4,510; (3) that under the Travancore Revenue Recovery Regulation this property could not be brought to sale; and (4) that the Government had no authority to attach and sell plaint A schedule items 2 to 5 and B schedule items 1 and 3 to 8 and C schedule items, which were not given as security under the bonds; and if the Government had no authority then the sale of all the properties is void

8. Coming to the first point, there is no doubt that wrong revenue numbers were mentioned in the notice dated 5th May, 1939. In the proclamation issued under section 32 of Regulation I of 1068 after mentioning the amount of Rs. 4,193 ch. 19 c. 9 which was due the properties were described in the schedule to the proclamation (Exhibit A B). In column 1 under the heading (name in which the assignment is made: Thanidapper and number is mentioned "1861 Luka Mathai, Pallithanathu Kainadi Muri, Neelamperur". Survey No. 545/32 is described as *nilam* and tenure as Pandaravaka Pattom. The area is 97 acres and taxes are also mentioned. There is a dispute whether against the survey No. 545/32 the letter 'A/1' existed or '11/1' as in the original proclamation, but there cannot be any dispute that otherwise the description of the property of 97 acres is correct and complete. Regarding survey No. 537/3 again the tenure is described as Pandara Pattom, area 14 cents and the local taxes are also given

9. In his evidence the plaintiff stated:

"I was aware that the property mortgaged by me was the property comprised in survey No. 545/32/A-1. It is being called as 97 acres. That which was mortgaged was also 97 acres. In addition to A-1. I have no other properties in survey No. 545/32".

He was asked: "Does any person other than you have *nilam* which is 97 acres in extent?" He answered: "No. There

are no other persons having 97 acres of *nilam* in the other numbers also "

10 The High Court referred to some earlier proceedings for recovery of the defaulted amounts, due to the Government, which took place in 1110 M E and 1112 M E and found that in those cases the correct survey numbers had been given. But as far as the proclamation in question relevant to the present sale are concerned, the High Court found

"But the proclamations which have been produced as Exhibits AB, AD and AE all show some correction by over-writing on the character A in survey No 545/32/A 1 and the figure '7' in survey No 537/3. The proclamation that was published in the Gazette on 12th Medam 1114 gives the survey numbers distinctly as 545/32/II/1 and 532/3. Likewise in the sale-notice Exhibit J in the copy that is served on the plaintiff the survey No is shown as 545/32/II/1 while in the original it is 545/32/A-1 but one cannot be sure whether A has been corrected or not"

The High Court however came to the conclusion that the description of the property in the relevant records was sufficient to identify the property correctly and to give the requisite information to the intending buyers. The High Court held that Exhibit M, the relevant portion of which we have extracted above, shows that the plaintiff had categorically stated that many persons knew for certain that survey No 545/32/A-1 which had been hypothecated to Government was coming up for auction sale on 10th May, 1939 and that the mistakes in the survey sub-division numbers even if they existed at the material time had not misled anybody and everybody concerned knew that the property proceeded against was really survey Nos 545/32/A-1 and 537/3. The High Court further observed that it had not been shown in the case that the mis-description of survey numbers has caused any real prejudice to the plaintiff in the revenue sale concerned. The High Court observed

' There is no case that in the piece of land bearing survey No 545/32 the plaintiff had any other plot than that bearing the sub-division No A/1 or

that there is a piece of land bearing the sub-division II/1 therein "

The High Court finally concluded

"An error in the survey number of the property involved in a proclamation of sale cannot be held to be such a vital defect as to compel us to hold the sale to be one 'without a proclamation' at all and to declare the sale void on that score, especially in view of the fact that, even according to the plaintiff, nobody was misled by that error"

11 We agree with this finding of the High Court. We are satisfied that on the material placed before us no other finding could be arrived at.

12 The learned Counsel referred to us a number of cases to show that if there is no publication of proclamation then that would vitiate the sale. The learned Counsel for the respondent referred us to the decision of this Court in *Sheodhyas Singh v Musammal Kuer*¹. Relying on this case the learned Counsel says that it was a case of misdescription and not a case of mistaken identity. He further says that the valuation suggested by the learned Counsel is highly exaggerated because in his plaint even the plaintiff had only said that the value was Rs 30,000. In that case the final decree for sale in a mortgage suit and in the certificate for sale the number of the property in dispute was given as No 160 instead of No 1060, which was the real number but the property was otherwise fully described so that its identity could be clearly established. This Court held that "as the khata number, the area and the boundaries given in the final decree and in the sale certificate tally with No 1060, the identity is clearly established and there has only been a mis-description of the plot in the final decree as well as in the sale certificate by the omission of one zero from the plot number. In another passage, referring to the decision of the Privy Council in *Thakur Barmha v Jiban Ram Maroari*², Wanchoo, J., observed that "the effect of this decision is that where there is no

¹ (1961) 2 S.C.J. 540 (1961) 2 M.L.J. (S.C.) 116 (1961) 2 An.W.R. (S.C.) 116 (1962) 2 S.C.R. 753
² (1913) L.R. 41 I.A. 38 26 M.L.J. 89

doubt as to the identity and there is only misdescription that could be treated as a mere irregularity”.

13. It seems to us that it is clear from the details mentioned in the proclamation, which we have mentioned above, that the bidder, the owner and the auctioneer had no doubt about the identity of the property which was being sold. This was not a case of a non-publication of the proclamation and, therefore, the rulings relied on by the learned Counsel for the appellant have no application.

14. Under section 32 (2) of the Travancore Revenue Recovery Regulation (Regulation I of 1068), what is required is that “previous to the sale, the Tehsildar shall issue a notice specifying the name of the defaulter, the position, tenure and extent of land and the buildings therein; the amount of revenue assessed on the land or upon its different sections; the proportions of the Public Revenue due during the remainder of the current Malabar year, and the time, place and conditions of the sale”. In our opinion, the proclamation satisfies the requirements of section 32 (2).

15. In view of the above conclusion it is not necessary to rely on the point of *res judicata* made by the High Court.

16. Regarding the second point, there is no material to show that the value of the property was anywhere more than Rs. 30,000. In view of the fact that the property had been mortgaged to Government and to private parties, we are not satisfied that the property was sold at a low price. The Trial Court has found that no fraud has been proved.

17. The third and fourth points arise out of the cross-objections filed by the plaintiff-appellant before us. The High Court disposed of the cross-objections in the following words:

“The plaintiff has preferred a cross-objection pleading that the revenue sale ought to have been declared void with regard to the other items of properties included in the plaint schedule also. Admittedly they were the subject-matter of the attachment and proclamation which culminated in the revenue sale. No defect in the pro-

ceedings except the error in the survey numbers discussed above, to affect the validity of the revenue sale has been brought to our notice. The cross-objection has no merits and has only to be dismissed”.

18. It is not quite clear whether the third ground was specifically taken in the cross-objections though ground No. 5 may perhaps cover it. Be that as it may, as the questions of jurisdiction and law are involved we have to deal with the point. Section 59 of the Travancore Recovery Regulation (Regulation No 1 of 1068), reads thus:

“59. *All arrears of public revenue due to Government other than land revenue,*

All moneys due from any person to Government which under a written agreement executed by such person are recoverable as arrears of public or land revenue, and all specific pecuniary penalties to which such person renders himself liable under such agreement,

and also all sums declared by any other Regulation for the time being in force to be recoverable as arrears of public or land revenue.

may be recovered under the provisions of this Regulation”.

19. The learned Counsel for the plaintiff contends that there is no written agreement which says that the moneys due under the bond can be recovered as arrears of public or land revenue. The learned Counsel for the respondent has not been able to point out any such agreement that the amounts due under the bonds can be recovered as arrears of revenue, and the only point he urges is that this point was new and should not be allowed to be taken. No other regulation has been brought to our notice which makes dues under this bond to be recoverable as arrears of public or land revenue. But we are unable to set aside the sale on this ground because if the point had been taken at an early stage the Government may well have relied on the power of sale given under the bond. The fact that the sale took place under the machinery provided by the Revenue Recovery Regulation and not under any *ad hoc* machinery set up by

[the Government would not vitiate the sale

20 But the fourth point raised by the learned Counsel for the plaintiff is fatal for the respondent. The bonds do not give power to the Government to sell the properties other than mentioned in the bond. The properties mentioned in plant A schedule items 2 to 5 B schedule items 1 and 3 to 8 and C schedule items were not given as security under the bond and the Government had no authority to sell them. It is conceded on behalf of the respondent that all the properties were sold in one lot. This, in our opinion, vitiates the whole sale and we have no option but to declare that the sale of all the properties was void.

21 In the result the appeal is allowed and the judgment of the High Court set aside and the decree passed by the Trial Court modified as follows:

"For the reasons stated in this judgment it is hereby declared that the proceedings such as revenue sale, etc. in respect of all the properties mentioned in the plaint schedules A, B and C are void and are accordingly set aside, that the plaintiff has the right to get a release of the properties under the mortgage deed dated 15th Edavan, 1107 including the said properties that the plaintiff do recover the said properties from out of the possession of the defendants, and that the plaintiff do realise from the defendants means profits as determined by the Trial Court."

The parties will bear their own costs throughout.

K G S

— Appeal allowed,
Judgment of High
Court set aside,
Decree of trial Court
modified

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction)

PRESENT — A N Ray and I D Dua, JJ

Nanak Awatrai Chainani Appellant*

v

Union of India

Respondent

Master and Servant—Railway administration and Stall holder—Agreement between the railway administration and the stall holder (a licensee)—Allotment of tea and refreshment stalls—To be run as per directions of the administration—Agreement providing termination without reasons, on one month's notice on either side—Termination of agreement—If effects valid discharge—Summary delivery under section 138 Railways Act—If can be ordered

The appellant had entered into two agreements with the railway administration and he was allotted a tea stall and a refreshment stall at Kalol Railway Station. The period of licence was three years subject to provisions for earlier termination, the appellant was described as a licensee in the agreements, the agreements were also terminable on one month's notice on either side without assigning any reasons. The principal term was that he should run the stalls in accordance with the direction of the railway administration. The agreements were terminated with effect from November 1965.

As the appellant did not deliver possession of the 2 stalls to the railway administration the latter applied to the judicial Magistrate, Kalol under section 138 of the Railways Act, for securing possession of the premises (the 2 stalls) which was ordered. In revision to the Sessions Judge, contending that he was not a railway servant and even if he were, he was not validly discharged for section 138 to apply, it was held that he was a railway servant, that the termination of the contract amounted to his discharge and therefore proceedings under section 138 could lawfully be initiated against him for summary delivery of property. A revision against the order of the Sessions Judge preferred to the High Court was

dismissed *in limine*. Hence the instant appeal by Special Leave to Supreme Court.

Held: The relationship of master and servant is characterised by agreement of service, express or implied, and whether or not a given agreement is one of service is a question of fact depending on its terms considered as a whole. The terms which govern the parties, expressly reserve to the railway administration extensive power of directing and regulating the appellant's work and also, to an extent, controlling the manner of doing the work. [Para. 6 and 7.]

A reading of Article 311 would show that the appellant cannot claim its benefit. The appellant is neither a member of the civil service as contemplated by this Article nor has he been dismissed, removed or reduced in rank so as to attract the protection of sub-Article (2) of this Article. The appellant's rights are clearly confined to the written agreements. If he considers that his agreements have been wrongfully terminated then he can challenge such termination in the civil Courts and claim whatever relief is available to him under the law. [Para. 5.]

May be that the appellant was allotted two stalls under the agreements with the object of rehabilitating him as a displaced person. But that consideration cannot over-ride the terms of the agreements and absolve him of his obligations thereunder and permit him to avoid the consequences of the alleged breaches of agreements on his part. [Para. 7.]

So far as the impugned order of the High Court and the order of the Sessions Judge is concerned there is no legal infirmity which would justify interference by the Supreme Court under Article 136 of the Constitution. [Para. 6.]

Appeal by Special Leave from the order dated the 23rd October, 1969 of the Gujarat High Court in Criminal Revision No. 407 of 1969.

Appellant *in person*.

S. P. Nayar, Advocate, for Respondent.

The Judgment of the Court was delivered by :

Dua, J.—In this appeal by Special Leave the appellant who has appeared in person

challenges the order of a learned single Judge of the Gujarat High Court (Shelat, J.) dismissing *in limine* criminal revision against the order of the Sessions Judge dated 4th October, 1969, dismissing the appellant's revision from the order of the Judicial Magistrate, Kalol dated 30th August, 1969, granting the application of the railway administration under section 139 of the Indian Railways Act and directing the P.S.I. Railways at Sabarmati who is also the P.S.I. Railways at Kalol to secure possession of the stalls in question from the appellant to the railway administration or to the person appointed by the administration in that behalf.

2. The appellant had, on 9th February, 1964, entered into an agreement with the railway administration by means of which he was allotted a tea table (hereafter described as tea stall) at Kalol railway station. This agreement came into force from 18th May, 1964 and subject to the provisions for earlier termination was to remain in force for three years. By a similar agreement dated 20th February, 1965, the appellant was allotted a refreshment stall at the same railway station for a period of three years subject to the provisions for earlier termination similar to the first agreement. In both the agreements the appellant was described as the licensee. Under these agreements the terms of which are identical the appellant was to run the two stalls in accordance with the directions of the railway administration. In addition to other terms for earlier termination, the agreements were also terminable under clause 52 by one month's notice on either side without assigning any reason. On 11th July, 1965, the two stalls were inspected by the Commercial Inspector and the Station Master and it was found that the appellant had committed irregularities and was not running them in accordance with the directions of the railway administration. A fine of Rs. 100 was imposed on him in terms of the agreement, the fine being payable within one week under clause 38 (a). The amount of fine having not been paid within the stipulated period a notice was given to the appellant on 16th September, 1965, for vacating the railway premises by 30th October, 1965. The appellant having failed to vacate the premises, the agreements were terminated with effect from November, 1965.

3 As the possession of the tea and refreshment stalls was not delivered by the appellant to the railway administration, the latter applied to the Judicial Magistrate Kalol under section 138 of the Indian Railways Act for securing possession of the aforesaid premises. Before the Magistrate it was not disputed that since the appellant had to work under the supervision and according to the directions of the railway administration he was a railway servant. This, according to the learned Magistrate, was not denied by the appellant even in his written statement, on the other hand it was claimed that the position of the appellant was at par with that of the railway servants. The appellant contested the application principally on the ground that the contracts of the tea and refreshment stalls had been entered into with the appellant with the object of rehabilitating him as a displaced person from Pakistan and that, therefore, those contracts could not be terminated. After a lengthy discussion on the points raised the learned Magistrate expressed his final conclusion in these words:

‘The opponent is proved to be railway servant. Also it is proved that his service has been lawfully discharged. Mr Thakursingh, the learned advocate for the opponent has contended that the applicant has terminated the agreement without any justification and without assigning any reason. But that is not required to be done by either party to the agreement. It is argued by Mr Thakursingh that the opponent is prepared to pay arrears of licence fees to the tune of Rs 4 000 or so and he is prepared to pay the same to the railway. But that is not a good ground to disallow the applications. Section 138 of the Railways Act provides for summary remedy for delivery to railway administration of property detained by a railway servant. The opponent who is proved to be a discharged railway servant refuses to deliver the stall and the place on which he is permitted to place a tea table though served with notice. Hence he is liable to be summarily evicted. He has prolonged the matter for unreasonably long period under different excuses. His services are terminated

and so he has occupied the stall and the place for table unauthorisedly.”

Reliance for holding the appellant to be a railway servant was placed on *S L Puri v Emp 101*¹.

4 The appellant took the matter in revision to the Court of the Sessions Judge. There the appellant denied that he was a railway servant, and urged as an alternative submission that even if he was a railway servant he had not been validly discharged. In any event, so proceeded his contention, no notice to deliver possession of the stalls having been given to him before filing the application under section 138, he could not be dispossessed through the Court. The Sessions Judge did not agree with these submissions and held that termination of the contract amounted to the appellant's discharge and, therefore, proceedings could lawfully be initiated against him under section 138 of the Indian Railways Act, for summary delivery of property, in his possession or custody, to the railway administration. The appellant was held to have become a railway servant by virtue of sections 3 (7) and 148 (2) of the Indian Railways Act. The Sessions Judge relied for his view both on *S L Puri's case*¹, and *R L Majumdar v Alfred Ernst*². A revision to the High Court, as noticed earlier, was dismissed *in limine*.

5 On appeal in this Court the principal point urged by the appellant is that by reason of being a railway servant he was automatically entitled as a matter of law to the protection afforded to Government servants by Article 311 of the Constitution. This submission is wholly misconceived. Article 311 is in the following terms:

“(1) No person who is a member of a civil service of the Union or an all India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removal or reduced in rank except after an inquiry in which he has

1 A.I.R. 1937 Lah 547

2 A.I.R. 1959 Cal 64

been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry:

Provided that this clause shall not apply—

“(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final”.

A plain reading of this Article would show that the appellant cannot claim its benefit. The appellant is neither a member of the civil service as contemplated by this Article nor has he been dismissed, removed or reduced in rank so as to attract the protection of sub-Article (2) of this Article. The appellant's rights are clearly confined to the written agreements and if he feels aggrieved by anything done by the railway administration which he considers to be in breach of the terms of the agreements, he is at full liberty to seek redress in accordance with law in the ordinary civil Courts. In other words, if he considers that his agreements have been wrongfully terminated then he can challenge such termination in the civil

Courts and claim whatever relief is available to him under the law.

6. So far as the impugned order of the High Court and the order of the Sessions Judge is concerned we are unable to find any legal infirmity which would justify interference by this Court under Article 136 of the Constitution. The relationship of master and servant is characterised by agreement of service, express or implied, and whether or not a given agreement is one of service is a question of fact depending on its terms considered as a whole. Indeed, it is not the appellant's case before us that he was not a railway servant. On the contrary, the main plank of his challenge is that as a railway servant he is entitled to claim the protection of Article 311 of the Constitution. This submission, as already observed by us, is clearly based on a misunderstanding of the scope and effect of that Article.

7. The appellant's next submission that the two agreements mentioned above clothed him with an independent vested right to do his business of running the two stalls in question, which right is heritable and not open to termination is equally misconceived and unacceptable. The express terms of the agreements exclude the heritable character of the appellant's right. The only right which the appellant could claim is a contractual right of a bare license and that right is subject to the terms contained in his agreements. He cannot claim any right outside or beyond these agreements. The terms which govern the parties, expressly reserve to the railway administration extensive power of directing and regulating the appellant's work and also, to an extent, of controlling the manner of doing the work. Keeping in view the purpose and object of these agreements, namely, that of affording necessary amenities to the travelling public, retention of this overall power by the railway administration is not only appropriate but necessary. The retention of this power by the railway administration; in our view, constitutes relevant material for sustaining the conclusion of the Courts below that the appellant is a railway servant, as defined in section 3 (7) read with section 148 (2), Indian Railways Act, against whom action can be taken

under section 138 of the said Act. This conclusion is in accord with the view expressed in the decisions of the Lahore and Calcutta High Courts to which reference has been made earlier. We do not find any cogent ground for disagreeing with that view which seems to have prevailed all these years. May be that the appellant was allotted two stalls under the agreements with the object of rehabilitating him as a displaced person. But that consideration cannot over-ride the terms of the agreements and absolve him of his obligations there under and permit him to avoid the consequences of the alleged breaches of agreements on his part. In this appeal we are not concerned with the question of violation of the terms of his agreements by the appellant nor can we consider the legality of the termination of his agreements. For that grievance the appellant has to seek relief elsewhere by a different process.

8 It may, in this connection, be pointed out that the appellant had also approached the Gujarat High Court by *certiorari* challenging the order of fine imposed on him, relying on the objection that the imposition of the fine was in violation of Article 311 of the Constitution. This writ petition was rejected on 25th August, 1969. In the Special Leave application, the appellant has averred that the Judicial Magistrate passed the order under section 138 of the Indian Railways Act on 30th August, 1969—only five days after the order of the High Court dismissing his writ petition—and it is contended that the impugned order must for that reason be held to have been inspired by *malice* against the appellant. We do not find any warrant for this assumption.

9 The appellant had also filed several miscellaneous applications in this Court which were dismissed by us after hearing him. He wanted to summon some witnesses and also some documents for proving that the allotment of the stalls had been made to him for the purpose of rehabilitating him as a displaced person. We did not consider it necessary to take evidence in this Court on that point. The written agreements, in our view, conclude the matter. The appellant also sought adjournment of this appeal on the ground that he wanted to engage a

senior counsel to argue his appeal, but that counsel could only appear after the summer vacation. We did not consider that to be a sufficiently cogent ground for adjourning the appeal, the hearing of which was expedited on 13th April, 1970. The appellant also applied for referring this case to the Constitution Bench because, according to him, the question raised was of great constitutional importance. We did not find any cogent ground for according to this prayer.

10 The appellant has, in his arguments, laid repeated stress on the submission that the impugned action of the railway administration would deprive him and his family of the only source of livelihood. That consideration has little relevance because this appeal has to be decided on the merits on the existing record in accordance with law. That indeed is a matter between the appellant and the railway administration. The request for allotment, we have no doubt, will be considered on its merits in accordance with the law and the relevant departmental practice. It is not for us in these proceedings to express any opinion on the merits of his claim.

11 This appeal fails and is dismissed.

K G S

— Appeal
dismissed

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*K. S. Hegde and A. N. Grover, JJ.*T. S. Balaram, Income-tax Officer, Company Circle IV, Bombay ... *Appellant.**

v.

M/s. Volkart Brothers and others
... *Respondents.*

Income-tax Act (XLIII of 1961), section 154 — Rectification—Mistake apparent from record — What is—Registered firm—Original assessments made on slab rates prescribed under respective Finance Acts applicable to registered firms—Individual assessments of partners assessed at maximum rates in the status of non-residents—Whether assessments can be rectified to apply maximum rates.

The assessee-firm was duly registered under the Income-tax Act, 1922, as well as under the Income-tax Act, 1961. The original assessments of the assessee-firm for the concerned assessment years were made on the slab rates prescribed under the respective Finance Acts applicable to registered firms. In the individual assessments of the partners their respective shares in the income of the assessee-firm was included and assessed at the maximum rates since their assessments were made in the status of non-residents on 1st February, 1965, the assessee firm was served with notices dated 29th January, 1965, by the Income-tax Officer intimating to it that in its assessments for the assessment years 1958-59, 1960-61, 1961-62 and 1962-63, there were mistakes apparent from the record inasmuch as the firm had not been charged at the maximum rates of income-tax under section 17 (1) of the Indian Income-tax Act, 1922 and therefore he proposed to rectify those assessments under section 154 of the Income-tax Act, 1961. The assessee-firm in its reply to those notices denied that there was any mistake apparent or otherwise in these

orders of assessment and disputed the Income-tax Officer's authority to make any correction. The Income-tax Officer rejected the contention and assessed the assessee-firm by applying the provisions of section 17 (1) of the 1922 Act. The assessee-firm challenged the validity of the orders rectifying the assessments before the High Court. The High Court took the view that the original assessments were *prima facie* in accordance with law and at any rate as there was no obvious or patent mistake in those orders of assessment and the Income-tax Officer was incompetent to pass the impugned orders. On appeal to the Supreme Court,

Held, that the Income-tax Officer was wholly wrong in holding that there was a mistake apparent from the record of the assessments of the assessee-firm. [*Para. 7.*]

A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions. A decision on a debatable point of law is not a mistake apparent from the record. [*Para. 7.*]

The question whether section 17 (1) of the Income-tax Act, 1922, was applicable to the case of the assessee-firm is not free from doubt. Therefore, the Income-tax Officer was not justified in thinking that on that question there can be no two opinions. It was not open to the Income-tax Officer to go into the true scope of the relevant provisions of the Act in a proceeding under section 154 of the Income-tax Act, 1961. [*Para. 7.*]

Appeal from the judgment and order, dated 3rd and 6th February, 1967, of the Bombay High Court in Miscellaneous Petition No. 104 of 1965.

Sukumar Mitra, Senior Advocate (*J. Ramamurthi, R. N. Sachthey and B. D. Sharma*, Advocates, with him), for Appellant.

M. C. Chagla, Senior Advocate (*B. A. Pulkhivala, Miss Bhuvnesh Kumari*, Advocates and *J. B. Dadachanji and Ravinder Narain*, Advocates of *J. B. Dadachanji & Co.*, with him), for Respondents.

* C. A. No. 1170 of 1968.

5th August, 1971.

The Judgment of the Court was delivered by

Hegde J—This appeal by certificate arises from the decision of the High Court of Bombay in Misc Petition No 104 of 1965 on its file. That was a petition under Article 226 of the Constitution. Therein the respondents challenged the validity of the orders of rectification made by the Income tax Officer, Company Circle Bombay in the assessments of the respondents for the assessment years 1958-59, 1960-61, 1961-62 and 1962-63, under section 154 of the Income tax Act, 1961. Respondents Nos 2 and 3 are the partners in the first respondent firm. The first respondent firm was duly registered under the Indian Income tax Act 1922, as well as under the Income tax Act 1961. In the original assessments of the firm for the concerned assessment years assessments were made on the slab rates prescribed under the respective Finance Acts applicable to registered firms. In the individual assessments of the partners their respective shares in the income of the firm were included and tax was assessed at the maximum rates since their assessments were made in the status of non resident. On 1st February, 1965 the first respondent firm was served with notices dated 29th January, 1965 by the Income tax Officer intimating to it that in its assessments for the assessment years 1958-59, 1960-61, 1961-62 and 1962-63, there are mistakes apparent from the record inasmuch as the firm had not been charged at the maximum rates of income tax under section 17 (1) of the Indian Income tax Act 1922, and therefore he proposes to rectify those assessments under section 154 of the Income-tax Act, 1961. The respondents in their reply to those notices denied that there was any mistake apparent or otherwise in those orders of assessment. They disputed the Income tax Officer's authority to make any correction. The Income tax Officer did not accept the contention of the respondents and assessed them by applying the provisions of section 17 (1) of the 1922 Act. The respondents challenged the validity of the orders rectifying the assessments before the High Court of Bombay as mentioned earlier. The High Court took the view that the original assessments made on the respondents were *prima facie* in accordance with law and at any rate as there was no obvious or

patent mistake in those orders of assessment the Income tax officer was incompetent to pass the impugned orders.

2. The first question that we have to decide is whether on the facts and in the circumstances of the case, the Income tax Officer was within his powers in making the impugned rectifications. He purported to make those rectifications under section 154 of the Income tax Act 1961. That section to the extent material for our present purpose reads

'154 (1) With a view to rectifying any mistake apparent from the record—

(a) the Income tax Officer may amend any order of assessment or of refund or any other order passed by him

* * * *

The corresponding section in the Indian Income tax Act, 1922, is section 35

3. We have now to see whether the Income tax Officer was justified in opining that in the original orders of assessment, there was any apparent mistake. As seen earlier, in the original assessments of the firm for the relevant assessment years, the Income tax Officer adopted the slab rates applicable to registered firms. The question for decision is whether the first respondent firm came within the mischief of section 17 (1) of the Indian Income-tax Act, 1922. Section 17 (1) reads

'Where a person is not resident in the taxable territories and is not a company, the tax including super tax payable by him or on his behalf on his total income shall be an amount equal to—

(a) the income tax which would be payable on his total income at the maximum rate plus

(b) either the super tax which would be payable on his total income at the rate of nineteen per cent of the super tax which would be payable on his total income if it were the total income of a person resident in the taxable territories, whichever is greater

(Provided to the section is not relevant for our present purpose)

4. Section 17 (1) can apply to a "person". The expression "person" is defined in

section 2 (9) of the Indian Income-tax Act, 1922, thus :

“ ‘person’ includes a Hindu undivided family and a local authority ”.

Unless a firm can be considered as a “person”, section 17 (1) cannot govern the assessment of the first respondent. In the Income-tax Act, 1961 (section 2 (31)). The expression “person” is defined differently. That definition reads:-

“ ‘person’ includes—

- (i) an individual,
- (ii) a Hindu undivided family,
- (iii) a company,
- (iv) a firm,
- (v) an association of persons or a body of individuals, whether incorporated or not,
- (vi) a local authority, and
- (vii) every artificial juridical person, not falling within any of the preceding sub-clauses.”

5. It is a matter for consideration whether the definition contained in section 2 (31) of the Income-tax Act, 1961 is an amendment of the law or is merely declaratory of the law that was in force earlier. To pronounce upon this question, it may be necessary to examine various provisions in the Act as well as its scheme.

6. Section 113 of the Income-tax Act, 1961, corresponded to section 17 (1) of the Indian Income-tax Act, 1922, but that section has now been omitted with effect from 1st April, 1965, as a result of the Finance Act, 1965.

7. From what has been said above, it is clear that the question whether section 17 (1) of the Indian Income-tax Act, 1922, was applicable to the case of the first respondent is not free from doubt. Therefore the Income-tax Officer was not justified in thinking that on that question there can be no two opinions. It was not open to the Income-tax Officer to go into the true scope of the relevant provisions of the Act in a proceeding under section 154 of the Income-tax Act, 1961. A mistake apparent on the record must be an obvious and patent mistake and not something which can be established

by a long drawn process of reasoning on points on which there may conceivably be two opinions. As seen earlier, the High Court of Bombay opined that the original assessments were in accordance with law though in our opinion the High Court was not justified in going into that question. In *Satyammarayan Laxminarayan Hegde and others v. Millikarjun Bhavanappa Tirumale*¹, this Court while spelling out the scope of the power of a High Court under Article 226 of the Constitution ruled that an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions cannot be said to be an error apparent on the face of the record. A decision on a debatable point of law is not a mistake apparent from the record. see *Sidhramappa Andannappa Manvi v. Commissioner of Income-tax, Bombay*². The power of the officers mentioned in section 154 of the Income-tax Act, 1961, to correct “any mistake apparent from the record” is undoubtedly not more than that of the High Court to entertain a writ petition on the basis of an “error apparent on the face of the record”. In this case it is not necessary for us to spell out the distinction between the expressions “error apparent on the face of the record” and “mistake apparent from the record”. But suffice it to say that the Income-tax Officer was wholly wrong in holding that there was a mistake apparent from the record of the assessments of the first respondent.

8. For the reasons mentioned above, we dismiss this appeal with costs.

T.K.K.

Appeal dismissed.

1. (1960) S.C.J. 1065; (1960) 1 S.C.R. 890.
2. (1952) 21 I.T.R. 333; 54 Bom.L.R. 163; A.I.R. 1952 Bom. 287.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —K S Hegde and A N Grover,
JJCommissioner of Income-tax, West Bengal,
Calcutta Appellant*Bengal River Service Co., Ltd., Calcutta
Respondent

(A) Double taxation relief—Indo Pakistan agreement—Assessee carrying on business of plying river boats before partition of India—Boats requisitioned by Government on charter basis—Hire received from Government but traffic originating in Pakistan—Whether can be brought to tax in India

The assessee carried on the business of plying river boats before the partition of India and its registered office was in Calcutta. In the accounting year (being calendar year 1946) relevant to the assessment year 1947-48 the Government requisitioned certain boats belonging to the assessee on charter basis. The assessee received Rs 3,43,138 as "hire" for the boats requisitioned by the Government during the accounting year in question but the traffic originated in the areas which are now a part of Pakistan. The question arose whether the receipt of Rs 3,43,138 can be brought to tax in India. The Income tax Officer held that the amount was income earned in the Indian Dominion and therefore liable to be brought to tax in India. In so doing he applied the provisions of Item 9 of the Schedule to the Agreement for Avoidance of Double Taxation between India and Pakistan and rejected the assessee's contention that its case fell within item 5 (g) and not item 9. This was upheld by the Appellate Assistant Commissioner but the Tribunal on further appeal held that the receipt in question fell within item 5 (g) of the agreement and therefore it is not liable to be taxed in India as admittedly the traffic originated in areas which are now part of Pakistan. The High Court on reference agreed with the view taken by the Tribunal. On appeal to the Supreme Court,

Held The Tribunal and the High Court were correct in holding that the receipt came within item 5 (g)

[Paras 6 and 7]

(B) Agreement for Avoidance of Double Taxation between India and Pakistan, (1947) Schedule, Items 5 (g) and 9—Interpretation and Scope

Item 5 (g) does not make any distinction between "hire" and "freight". It deals with all types of transport by ships. Item 9 is a residuary clause. That item will be attracted only if the income profit or gains earned or received cannot come within any other item. Since the receipt arose as a result of transport by ships, it came plainly within item 5 (g).

[Para 6]

Appeal from the judgment and order dated 3rd May 1967 of the Calcutta High Court in Income tax Reference No 18 of 1958

Jagadish Swarup, Solicitor General of India (S K Aiyer, R N Sachdev and B D Sharma, Advocates, with him), for Appellant

R K Lal and G S Chatterjee, Advocates of Kshatriya and Chatterjee, for Respondent

The Judgment of the Court was delivered by

H gde, J—This is an appeal by certificate under section 66 A (2) of the Indian Income tax Act 1922 (in brief 'the Act') arising from the decision of the High Court of Calcutta in Income tax Reference No 18 of 1958 on its file. Therein two questions of law were referred to the High Court for its opinion. They are

1 Whether on the facts and in the circumstances of this case, the amount of Rs 3,43,138 received by the assessee was derived from a source or category of transaction mentioned in Item 5 (g) of the Schedule to the agreement for the Avoidance of Double Taxation of Income between India and Pakistan? and

2 If the answer to the above question be in the negative, then whether the aforesaid sum fell under item 9 of the Schedule of the aforesaid Agreement?

2 The High Court agreeing with the Tribunal's findings answered the first

question in the affirmative and, consequently, declined to answer the second question. Aggrieved by that decision the Department has brought this appeal.

3. The respondent-assessee carried on the business of plying river boats before the partition of India. Herein we are concerned with the income earned by the assessee in the assessment year 1947-48, the relevant accounting year being the calendar year 1946. In that accounting year the Government requisitioned certain boats belonging to the assessee on charter basis. The statement of the vessels so chartered and income received therefrom during the year was placed before the Tribunal. But it is not necessary to refer to the same as it has no bearing on the question of law that we are called upon to decide. The assessee's registered office was in Calcutta. It is said that during the accounting year in question, the assessee received Rs. 3,43,138, as 'Hire' for the boats requisitioned by the Government. But the traffic originated in the areas, which are now a part of Pakistan. The question for consideration is whether the receipt of Rs. 3,43,138 can be brought to tax in this country. For deciding that question, it is necessary to refer to a few more facts :

4. In order to avoid double taxation of income, profits and gains because of the partition of India, the Government of India entered into an agreement with Pakistan in 1947 in exercise of the powers conferred on it by section 49-AA of the Act, section 11-A of the Excess Profits Tax Act, 1940 and section 18-A the Business Profits Tax Act, 1947 as adapted. That agreement to the extent material for our present purpose reads thus :

"Whereas the Government of the Dominion of India and the Government

of the Dominion of Pakistan desire to conclude in agreement for the avoidance of double taxation of income chargeable in the two Dominions in accordance with the their respective laws:

Now therefore, the said two Governments do hereby agree as follows :

Article I. * * *

Article II. * * *

Article III. * * *

Article IV.—Each Dominion shall make assessment in the ordinary way under its own laws; and, where either Dominion under the operation of its laws charges any income from the sources or categories of transaction specified in column I of the Schedule to this Agreement (hereinafter referred to as the Schedule) in excess of the amount calculated according to the per centage specified in columns 2 and 3 thereof, that Dominion shall allow an abatement equal to the lower amount of tax payable on such excess in their Dominion as provided for in Article VI.

Article V. * * *

Article VI.—(a) For the purposes of the abatement to be allowed under Article IV or V, the tax payable in each Dominion on the excess or the doubly taxed income as the case may be, shall be such proportion of the tax payable in each Dominion as the excess or the doubly taxed income bears to the total income of the assessee in each Dominion.

(b) * * *

Article VII * * *

Article VIII * * *

Article IX * * *

THE SCHEDULE

(See Article IV)

Source of income or nature of transaction from which income is derived			Percentage of income which each Dominion is entitled to charge under the Agreement	Remarks
(1)	(2)	(3)	(4)	
1	*	*	*	
2	*	*	*	
3	*	*	*	
4	*	*	*	
5	Income from business' or "other Sources" —			
(a)				
(b)				
(b)				
(d)				
(e)				
(f)				
(g)	Transport (Ships, Air, Road)	100 per cent by the Dominion in which the traffic originates	Nil by the other	
6	*	*	*	
7	*	*	*	
8	*	*	*	
9	Any income derived from a source or category of transactions not mentioned in any of the foregoing items of this Schedule	100 per cent by the Dominion in which the income actually accrues or arises	Nil by the other	

5 It appears from the statement of the case that the assessee earned Rs 3,43,138, in Calcutta and Rs 7,296 in Narayan Gang (now in Pakistan) from out of the hire received from the Governments in respect of the boats chartered by them. The Income tax Officer held that the amount of Rs 3,43,138 so received was income earned in Indian Dominion and therefore liable to be brought to tax in this country. In so doing he applied the provisions of item 9 of the Schedule to the agreement for Avoidance of Double Taxation. According to the assessee its case fell within item 5 (g) and not item 9. The Income-tax Officer did not accept that contention. In appeal the Appellate Assistant Commissioner agreed with the conclusions reached by the Income tax Officer but the Income tax Appellate

Tribunal differed from the view taken by the Income-tax Officer, and the Appellate Assistant Commissioner. It came to the conclusion that the receipt in question fell within item 5 (g) of the agreement and therefore it is not liable to be taxed in this country as admittedly the traffic originated in areas which are now part of Pakistan. As mentioned earlier the High Court agreed with the view taken by the Tribunal.

6 It was urged on behalf of the Department by the learned Solicitor General that there is a distinction between the "hire" and "freight". According to him item 5 (g) of the agreement deals only with "freight" whereas any "hire" received would come within item 9. We see no basis for this subtlety. Q^{ue}

plainly item 5 deals with transport by ships, air and road. Herein we are dealing with income realised as a result of the transport by ships. Item 5 (g) does not make any distinction between "hire" and "freight". It deals with all types of transport by ships. Item 9 is a residuary clause. That item will be attracted only if the income, profits or gains earned or received cannot come within any other item. As mentioned earlier, the income with which we are concerned in this case plainly comes within item 5 (g). We agree with the Tribunal and the High Court that the receipt with which we are concerned in this case comes within item 5 (g).

7. For the reasons mentioned earlier, we are of opinion that the High Court correctly answered the questions referred to it.

8. In the result this appeal fails and the same is dismissed with costs.

T.K.K. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT.—*J.G. Shah, G.J., K.S. Hegde and A.N. Grover, J.J.*

M/s. Jer & Co. .. Appellant*

v.

Commissioner of Income-tax, U.P.
.. Respondent.

Income-tax Act (XI of 1922), section 26-A—U.P. Excise Rules, rules 574, 322—U.P. Excise Manual, Form, FL II—Registration of firm—Partnership by brothers—Vending foreign liquor—Licence issued to one brother—Form of licence-holder, not prohibited from entering into a partnership—Firm, legal—Entitled to registration.

Two brothers entered into a partnership to carry on the business of wholesale merchants and in foreign liquor. One of them obtained in 1945 a licence from the Excise authorities under rule 574 of the U.P. Excise Rules and issued in Form

FL II under the U.P. Excise Manual, for wholesale vending of foreign liquor. The licence contained no prohibition against entering into partnership by the holder of licence. On the question of renewal of the registration of the firm under the Income-tax Act, the High Court in reference held that the firm was not entitled to the renewal on the footing that the partnership was illegal. The assessee appealed.

Held, the Commissioner and the High Court proceeded on the footing that the licence was governed by rule 322 which prohibited the holder of the licence from entering into a partnership with another person. But the licence issued in Form FL II under the U.P. Excise Manual, did not prohibit the holder from entering into a partnership; it merely provides that the licence shall not be sub-let or transferred. Since there is no prohibition against the holder of the licence from entering into a partnership the question whether the firm was illegal does not arise. The firm was entitled to registration. [Para. 4.]

Appeals by Special Leave from the Judgment and Order, dated 13th August, 1965, of the Allahabad High Court in I.T. Ref. Misc. Case No. 599 of 1962.

M.C. Chagla, Senior Advocate (*B. Datta*, Advocate, and *J.B. Dadachanji*, *O.C. Mathur* and *Ravinder Narain*, Advocates of *J.B. Dadachanji & Co.* with him), for Appellant.

Jagdish Swarup, Solicitor-General of India (*Rampangwan*, *P.N. Sachthey* and *B.D. Sharma*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, G.J.—By an agreement dated, 21st July, 1945, two brothers Dady and Minoo, entered into a partnership to carry on the business of wholesale merchants and in foreign liquor in the name and style of "Jer and Company" at Agra. Dady obtained in 1945 a licence from the Excise authorities under rule 574 of the U.P. Excise Rules for wholesale vending of foreign liquor. The licence was renewed every year. The licence contained no prohibition against entering into partnership for carrying on the business in foreign liquor by the holder of the licence.

* C.As. Nos. 186 and 187 of 1967.

13th January, 1971.

2 The partnership was registered under section 26-A of the Indian Income tax Act, 1922 till the assessment year 1957-58 and tax was assessed and levied on the footing that the firm was a registered firm. On applications for renewal filed by the firm for the assessment years 1958-59 and 1959-60, the Income-tax Officer granted registration, but the order was set aside by the Commissioner of Income tax in exercise of his power under section 33 B of the Indian Income-tax Act. The firm appealed against the order to the Income-tax Appellate Tribunal. The Tribunal allowed the appeal holding that there was no sub letting or transfer of the business covered by the licence in contravention of clause 13 of the licence, that the licence had been granted from 1945 in the same form as for the assessment years under consideration that the partners carried on the business of wholesale merchants in addition to that of vending liquor wholesale, that the partnership deed was for sharing the profits alone and on that account there was no violation of the terms of the licence.

3 At the instance of the Commissioner, the following question was referred by the Tribunal to the High Court of Allahabad:

"Whether, on the facts and in the circumstances of the case the firm was entitled to registration under section 26 A of the Income tax Act, 1922?"

The High Court answered the question in the negative. The firm has appealed to this Court with Special Leave.

4 The Commissioner and the High Court proceeded on the footing that the licence was governed by rule 322 which prohibited the holder of the licence from entering into a partnership with another person. But the licence, it is clear from the record, was in Form FL II issued under the U.P. Excise Manual. The licence does not prohibit the holder from entering into partnership by the holder of the licence. It merely provides that the licence shall not be sub let or transferred. Since there is no prohibition against entering into a partnership by the holder of the licence the question whether the partnership was illegal does not arise. The firm was entitled on that account to registration. It is somewhat unfortunate that the attention of the Commissioner

and the High Court was not invited to the form in which the licence was issued by the excise authorities. They proceeded to decide the case on the footing that rule 322 of the Excise Manual applied. But that rule has no application here.

5 On that view, it is unnecessary to consider the other questions argued at the bar, whether the partnership related to sharing of profits of the business in liquor carried on by the two partners and that it was not a partnership relating to the licence.

6 The appeals are, therefore, allowed. The answer recorded by the High Court is discharged and the answer to the questions will be in the affirmative. The Commissioner will pay the costs of the appellant in this Court and in the High Court. One hearing fee.

V S ——— Appeals allowed

THE SUPREME COURT OF INDIA (Civil Appellate Jurisdiction)

PRESENT — J C. Shah, C J, K S Hegde and A N Grover, JJ

Commissioner of Income-tax, Andhra Pradesh, Hyderabad Appellant

v

M/s Kotrika Venkataswamy & Sons Respondents

Income tax Act (XI of 1922), section 66—Fact or law—Reference—Tribunal—Assessment proceedings—Additions to the returned income—Sustained by Tribunal in appeal—Penalty proceedings—Penalty reduced by Tribunal in appeal—Finding no proof of concealment of certain income—Order of Tribunal declining to make a reference, justified—Fact and no question of law involved—Jurisdiction of Tribunal to reach a conclusion different from the one in assessment proceedings—Question outside the scope of the reference asked for

The Tribunal upheld the order of assessment made by the Officer who founded an examination of the assessee's books that

there was inflation in purchase, spurious cash credits, diversion of sales and claims of bogus speculation losses and who made additions to the returned income. But the Tribunal in the appeal arising from penalty proceedings, held that there was concealment only in respect of certain income and reduced the penalty. The department applied to the Tribunal to refer the question whether the Tribunal was justified in concluding that the department did not prove concealment of income in regard to two items. The Tribunal declined to make a reference on the ground that no question of law arose out of its order. The High Court also refused to call for a reference. The Revenue appealed.

Held : if the Tribunal reached the conclusion that it did, that there was no suppression of income on the facts disclosed, no question of law would arise to justify the Tribunal in making a reference under section 66 (1). [Para. 4]

The question whether the Tribunal had no jurisdiction to disagree with its own finding reached in the assessment proceedings was not specifically asked to be referred by the Tribunal. Such a question was also outside the reference asked for by the revenue. [Paras. 5 and 6]

Appeals by Special Leave from the Judgment and order, dated 22nd, 23rd August, 1966 of the Andhra Pradesh High Court in Income-tax Cases Nos. 16, 17, 18 and 19 of 1965.

S.T. Desai, Senior Advocate (*S.K. Aiyar*, *B.D. Sharma* and *R.N. Sachthy*, Advocates, with him), for Appellant.

M.G. Chagla, Senior Advocate (*T.A. Ramachandran* Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, C. J.—The facts in these four appeals are substantially common. We will deal with the facts in respect of only one appeal (Civil Appeal No. 631 of 1967) relating to the assessment of income-tax for the assessment year 1943-44. The decision will govern the other appeals.

2. The assessee declared in his return for the assessment year 1943-44 an income of Rs. 34,560. On examination of the accounts produced by the assessee the Income-tax officer found that there was

inflation in purchase, spurious cash credits diversion of sales, and bogus speculation losses were claimed. In assessing the income the Income-tax Officer made additions under four heads of different items of income and brought to tax an income of Rs. 1,43,433. The order passed by the Income-tax Officer was substantially confirmed in appeal by the Appellate Assistant Commissioner and by the Tribunal.

3. The Income-tax Officer also commenced a proceeding under section 28 (1) (c) of the Indian Income-tax Act and imposed a penalty of Rs. 24,500 upon the assessee. Against the order passed in proceedings for levying penalty, appeals were taken to the Appellate Assistant Commissioner who confirmed the order passed by the Income-tax Officer. The Income-tax Appellate Tribunal was of the view that there was concealment only in respect of cash credits and in suppressing sales in the partner's accounts and reduced the penalty to Rs. 2,000 only. The Commissioner of Income-tax then applied under section 66 (1) of the Act for referring the following question :—

“Whether on the facts and in the circumstances of the case, and on true appreciation of the material on record, was the Appellate Tribunal justified in coming to the conclusion that the department did not prove concealment of income in respect of the following additions, *viz.*, (1) inflation of purchases—transaction in the name of K. Venkateshiah Chetty, Rs. 21,500, (2) speculation losses in the names of seven persons Rs. 26,789.”

The tribunal declined to make a reference holding that no question of law arose out of its order. An application under section 66 (2) of the Act calling for a statement of case from the Tribunal on the same question filed before the High Court also did not succeed. With Special Leave this appeal has been preferred.

4. In our judgment the question raised was purely one of fact. On the materials and in the circumstances of the case if the Tribunal reached the conclusion that it did, that there was no suppression of sales on the facts disclosed, no case could be referred to the High Court under section 66 (1) seeking to upset that conclusion. We do not think that any question of law arose which would justify

the Tribunal in making a reference under section 66 (1) to the High Court for calling for a statement of case from the Tribunal on that question

5 Mr Desai, appearing for the appellant, contends that even if the Tribunal's findings in the appeal relating to levy of penalty were based on appreciation of evidence the Tribunal had no jurisdiction to disagree with its own findings reached in the assessment proceeding. That, Mr Desai contends, is a question of law and the Tribunal was bound to draw up a statement of case and refer that question, and if the Tribunal did not refer that question the High Court was entitled and was indeed bound to order that a statement of case on that question be submitted. But then, no such question was included in the application for reference under section 66 (1). The appellant could not ask the High Court to call for a statement of case on a question on which the Tribunal was not asked to submit a statement. Under section 66 (2) of the Act the High Court may call for a statement of case if the High Court is not satisfied about the correctness of the decision of the Tribunal refusing to refer a case to the High Court. The High Court cannot obviously be satisfied that the decision of the Tribunal in not submitting a statement on a question is incorrect when the Tribunal was never asked to submit a statement of case on that question. The Tribunal in the present case was not requested to submit a case on the question whether it had no jurisdiction to arrive at a conclusion different from the one which it had reached in the proceeding for assessment.

6 Mr Desai, in the alternative, contends that the question which was submitted to the Tribunal for reference to the High Court was itself wide enough to include the question about the jurisdiction of the Tribunal to reach a conclusion different from that which it had reached in the assessment proceeding. We are unable to agree with Mr Desai. The frame of the question submitted clearly shows that what the Tribunal was asked to do was to submit a case to the High Court on the question whether the Tribunal was justified in coming to the conclusion on the facts and circumstances of the case that no concealment was proved by the

department. That question cannot, in our judgment, include an inquiry whether the Tribunal had jurisdiction to reach a conclusion different from the conclusion it had reached in the proceeding for assessment.

7 The appeals therefore fail and are dismissed with costs. There will be one hearing fee in all the appeals.

V S ——— Appeals dismissed

THE SUPREME COURT OF INDIA (Civil Appellate Jurisdiction)

PRESENT — J M Shelat, I D Dua and V Bhargava JJ

Shambhu Prasad Singh Appellant*

v

Most Phool Kumari and others
Respondents

(A) Hindu Law—Family arrangement—Requirements

It is not necessary for a valid family arrangement that there must exist actual competitive claims or disputes or that the arrangement must be backed by proper consideration. Even disputes likely to arise in future or preservation of family property and honour would be sufficient to uphold an arrangement *bona fide* made between the members of a family.

[Para 8]

A family arrangement is based on an assumption of an anterior title and its acknowledgment in one to whom a property or part of it falls under the arrangement. Therefore, it is not necessary that there must exist an anterior title sustainable in law in such a person which the others acknowledge.

[Para 9]

The arrangement has to be considered as a whole for ascertaining whether it was made to allay disputes, existing or apprehended, in the interest of harmony in the family or the preservation of property. It is not necessary that there must exist a dispute, actual or possible in the future, in respect of each and every item of property.

and amongst all members arrayed one against the other. It would be sufficient if it is shown that there were actual or possible claims and counter-claims by parties in settlement whereof the arrangement as a whole had been arrived at, thereby acknowledging title in one to whom a particular property falls on the assumption (not actual existence in law) that he had an anterior title therein. [Para. 10.]

(B) *Co-sharer—Adverse possession—Claim of adverse possession by a co-sharer against another—Onus and nature of proof required.*

On the question of adverse possession by a co-sharer against another co-sharer, the law is fairly well settled. Adverse possession has to have the characteristics of adequacy, continuity and exclusiveness. The onus to establish these characteristics is on the adverse possessor. Accordingly, if a person having title proves that he too had been exercising during the currency of his title various acts of possession, then the quality of those acts, even though they might not be sufficient to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from a person challenging by possession the title which he holds. [Para. 17.]

As between co-sharers, the possession of one co-sharer is in law the possession of all co-sharers. Therefore to constitute adverse possession, ouster of the non-possessing co-sharer has to be made out. As between them, therefore, there must be evidence of open assertion of a hostile title coupled with exclusive possession of and enjoyment by one of them to the knowledge of the other. But, once the possession of a co-sharer has become adverse as a result of ouster, a mere assertion of a joint title by the dispossessed co-sharer would not interrupt the running of adverse possession. He must actually and

effectively break up the exclusive possession of his co-sharer by re-entry upon the property or by resuming possession in such a manner as it was possible to do. The mere fact that a dispossessed co-sharer comes and stays for a few days as a guest is not sufficient to interrupt the exclusiveness or the continuity of adverse possession so as not to extinguish the rights of the dispossessed co-sharer. [Para. 17.]

In the present case the adverse possession by *B* was sufficiently interrupted by acts of possession by *N* and therefore his title was not extinguished by adverse possession. [Para. 26.]

Appeal against the judgment and decree of the Patna High Court in Letters Patent Appeal No. 119 of 1956, dated 20th August, 1964

D. Goburdhun and *R. Goburdhun*, Advocates, for Appellant.

S.V. Gupta, Senior Advocate, (*D.P. Singh*, Advocate, of *M/s. Ramamurthi & Co.*, and *N. Nettar*, Advocate, with him), for Respondent No. 1.

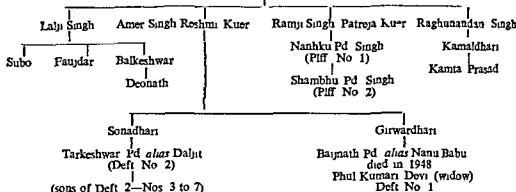
U.P. Singh, Advocate, for Respondents Nos. 2 to 4.

The Judgment of the Court was delivered by

Shelat, J.—Two questions arise in this appeal. The first is whether the transaction evidenced by Exhibit 1, dated 20th March, 1915 was a family arrangement so as to confer on the appellant and his father, Nanhku Prasad, since deceased, title to a half share in the house in dispute. The second is that even if it was so, whether such title became extinguished as a result of adverse possession for the statutory period by Bajnath, the deceased husband of respondent 1.

2. The parties are near relations. The following genealogy explains the relationship amongst them:

RAJKUMAR SINGH



3 There is no dispute that Amar Singh purchased from his own funds under a registered deed, dated 20th January, 1898, the land on which the house in dispute stands. His son, Nanhku, the deceased father of the present appellant, was taken in adoption sometime prior to 20th March 1915 by Ramji Singh and his wife Patreja Kuer as they had no issue, whereupon Nanhku ceased to have any interest in the properties owned by Amar Singh and his branch. In 1933, Nanhku and the present appellant, then a minor, filed Suit No. 33 of 1933 against Sonadhari, Tarkeshwar Bajnath and Reshmi Kuer (the widow of Amar Singh wrongly described by the High Court as the wife of Rajkumar in the genealogy set out in its judgment) in respect of certain properties which had nothing to do with the house in dispute. The written statement filed in that suit was that Nanhku had been paid the price of his share in the house in dispute and that the entire house, consequently, belonged to and was since then in the exclusive possession of the defendants. That suit went up to the High Court when in 1941 a compromise application was filed by the parties settling that suit. But, as the suit had nothing, as aforesaid, to do with the house in dispute, nothing was said about the allegation that Nanhku had been paid off in respect of his interest in that house.

4 In 1949, Nanhku and the appellant filed the instant suit for a declaration of their half share in the house in dispute. In answer to the suit, the respondents raised three defences: (1) that Nanhku and the appellant derived no interest under Exhibit 1, (2) that assuming that they

derived such interest, it was relinquished by them on being paid the price thereof, and (3) that in any event they lost their interest by reason of adverse possession by the respondents. The trial Court rejected all the three defences raised by the respondents and decreed the suit, holding that Nanhku had acquired one half share in the said house under Exhibit 1. Against that decree two appeals were filed in the High Court, one by respondent 1 and the other by some of the other respondents. These appeals were heard first by a learned Single Judge of the High Court. Before the learned Single Judge, the finding of the trial Court that Nanhku and the present appellant had not relinquished their interest in the house on their being paid the price thereof was not disputed. The only questions agitated before the learned Single Judge, therefore, were whether Nanhku had a half share, that is to say, whether he derived his title to the half share under and by virtue of Exhibit 1, and if so, whether he lost it as a result of adverse possession by the respondents.

5 In respect of the first question, the parties urged two conflicting pleas. Nanhku and the appellant contended that Exhibit 1 was a family arrangement under which he got half share in the house and that that family arrangement was valid and binding on the parties. The respondents on the other hand, contended that Exhibit 1 was only a *Ladavi* deed, that is, a deed of relinquishment. The argument on behalf of Nanhku and the appellant was that there were outstanding disputes between the different branches of the family of Rajkumar, and those disputes were ultimately settled at the

instance of and with the aid of certain family friends resulting in Exhibit 1 by way of a family arrangement. Therefore, even if Nanhku and the appellant were not able to show their anterior title to the house, they were entitled under Exhibit 1 to a half share therein. The learned Single Judge accepted the contention raised by Nanhku and the appellant. His reasoning in this connection was that although the land on which the suit house stood was purchased by Amar Singh out of his own funds, it was purchased in the furzi name of Lalji, but there was no evidence that Lalji ever admitted to be the furzidar of Amar Singh. Consequently, though Nanhku, by his adoption, lost all interest in the properties of Amar Singh, yet the fact that in Exhibit 1 Amar Singh acknowledged Nanhku having a half share in the house indicated that there was some apprehension in the mind of Amar Singh of a future dispute and that it was such an apprehended dispute which Exhibit 1, while dealing with the house, settled. The learned Single Judge added that even assuming that there was no existing or apprehended dispute and the settlement was made out of consideration for the peace of the family or preservation of its properties, the settlement would have to be regarded as a family arrangement. Regarding the plea of adverse possession, he upheld the finding of the trial Court that Nanhku and the appellant had established their acts of possession during the statutory period, and that consequently, the continuity and exclusiveness of the respondents' adverse possession had been disrupted. On these findings, he dismissed the appeals and confirmed the decree passed by the trial Court.

6. Respondent 1 thereupon filed a Letters Patent Appeal which was heard by a Division Bench of the High Court. The same two questions were reagitated, namely, as to the nature of Exhibit 1, and as to the adverse possession. On the first question, the reasoning adopted by the Division Bench was on the following lines :

(1) that the executants of Exhibit 1 formed three conflicting groups, namely,

(a) Suba, Faujdar and Balkeshwar, constituting one group of members of Lalji's branch, being executants 1 to 3 ;

(b) Raghunandan and his son, Kamal-dhari, being executants 4 and 5 and constituting Raghunandan's branch ; and

(c) Amar Singh for himself and as the guardian of Baijnath, then a minor, Sonadhari for himself and as guardian of his minor son, Tarkeshwar, and Nanhku who had, as earlier stated, gone to the line of Ramji on his adoption, being executants 6, 7 and 8 ;

(2) that the disputes, in settlement of which Exhibit 1 was executed by these three groups, were as its recitals show ;

(a) conflicting claims made by the said three sets of executants as to whether they were joint or separate in status, the claim of executants 1 to 3 being that all the members of Rajkumar's family were still members of an undivided Hindu family, and that therefore, although the properties stood in the names of and were in possession of individual members, they continued to be joint family properties including properties standing in the names of female members, namely, Reshmi and Patreja ;

(b) the allegations by executants 4 and 5 (Raghunandan's branch) that all the four branches of Rajkumar's four sons were separate and yet claiming share in the properties standing in the names of members of Lalji's branch and,

(c) the claim by executants 6, 7 and 8 (Amar Singh, Sonadhari and Nanhku by now in the line of Ramji) that the parties were separate in status, and therefore, the properties in the names of the two said females belonged exclusively to them and the members of the other branches had no interest whatsoever in them ;

(3) that the trial Court and the learned Single Judge were in error in holding that what Exhibit 1 did was to evidence relinquishment by the rest of the members of the family of their claims in properties standing in the names of or in possession of particular members, and thereby acknowledging their anterior title in such properties. In fact Nanhku had no such anterior title, nor could he in law have any such title in the house in dispute in view of his having got out of Amar Singh's branch as a result of his adoption by Ramji ;

(4) that there was no subsisting or apprehended dispute between Amar Singh

and his family, on the one hand, and Nanhku on the other, the latter not having made any claim for a share in the house in dispute, and that therefore, there was no question of preservation of peace or family property, there being nothing on record to show that Nanhku had held out any threat to the family peace or property therefore, there was a total want of mutuality as in consideration of Nanhku getting a half share Amar Singh got nothing in return and cases of the type of *Williams v Williams*¹, had no application,

(5) that the recitals in Exhibit I showed that the only dispute which prevailed at the time was 'branchwise' and in that dispute Nanhku did not set up any contest against Amar Singh and his branch and indeed both of them acted in concert, both claiming that the members of Rajkumar's family were separate and the properties standing in the names of Reshm and Patreja were their exclusive properties,

(6) that acknowledgment of exclusive title of Amar Singh and Sonadhari (executants 6 and 7) to certain properties, and likewise acknowledgment of exclusive title of Nanhku (executant No 8) to certain other properties set out in paras 3 and 4 of Exhibit I were not by way of settlement of any existing or apprehended dispute between them, and therefore, that part of Exhibit I could not be regarded as providing any consideration for conferring the half share in the disputed house on Nanhku

On this reasoning the Division Bench declined to treat Exhibit I as a family arrangement. The conclusion of the Bench clearly signified that it had relied on two fundamental premises (1) that there were only three sets of executants, the third set consisting of executants 6, 7 and 8, and (2) that Amar Singh and Nanhku had acted in concert as there were no conflicting claims by and between them

7 In view of this conclusion there was no need for the Division Bench to go into the question of adverse possession. However, it decided to do so for the reason that although the finding on the ques-

tion of adverse possession was concurrent, it had been seriously challenged before it. On this question, the Division Bench firstly relied on the Municipal Assessment Register for 1900 1901, (Exhibit D) and the extract from the Demand Register of Patna Municipality for 1915 16, (Exhibit E). Exhibit D showed the name of Amar Singh as the sole owner of the property. Exhibit E mentioned Sonadhari and Bajnath only as the owners of the house as Amar Singh had died soon after Exhibit I was brought into existence. The Division Bench was impressed by the fact that though only recently, in March, 1915, Nanhku's half share in the house had been acknowledged in Exhibit I his name was deliberately omitted in Exhibit E which meant that Sonadhari and Bajnath had openly asserted their title to the whole of the house and yet Nanhku took no steps to assert his title. Nor did he at any time pay his share of the Municipal taxes and the costs of repairs carried out later on by Bajnath. The Division Bench was also impressed with the fact that even when Bajnath in his written statement in Suit No 33 of 1933, claimed that Nanhku's share had been paid off and he had since then been in exclusive possession of the entire house, Nanhku took no steps to vindicate his title until he and his son filed the present suit in 1949. The Division Bench came to the conclusion that there was not only an assertion of a hostile claim by Bajnath but that that assertion was accompanied by an ouster which remained open and continuous throughout the statutory period. As regards the evidence that Nanhku and sometimes his wife came and stayed in the house, the Division Bench took the view that these were casual visits "in the nature of visits of guests of the defendants", and therefore, did not have the effect of interrupting the continuity and the exclusiveness of possession by the respondents. The Bench even observed that the respondents had completed their title by adverse possession long before Bajnath claimed exclusive possession in his said written statement in 1933. In this view, the Division Bench held that Nanhku's title in the house was extinguished by adverse possession. The Division Bench accordingly allowed the respondents' appeal with costs all throughout. Both the conclusions of the Division Bench

have been challenged before us as incorrect.

8. On the question as to the nature of Exhibit 1 a large number of decisions were cited at the bar to show when a transaction can be said to be a family arrangement. It is not necessary to advert to them as most of them have been considered by this Court in its previous decisions, wherein principles as to when an agreement can properly be regarded as a family arrangement have been set out. Thus, in *Pullaiah v. Narasimham*¹, after setting out how Courts in England view family arrangements, Subba Rao, J. (as he then was) observed that the concept of such a family arrangement has also been accepted by Courts in India, adapting the concept to suit the family set up in this country which is different in many respects from that obtaining in England. After examining some earlier decisions which he characterised as illustrations of how family arrangements were viewed, he summarised the law as to a family arrangement as follows:

“Briefly stated, though conflict of legal claims *in praesenti* or *in futuro* is generally a condition for the validity of a family arrangement, it is not necessarily so. Even *bona fide* disputes, present or possible, which may not involve legal claims will suffice. Members of a joint Hindu family may, to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an arrangement is entered into *bona fide* and in the terms thereof are fair in the circumstances of a particular case, Courts will more readily give assent to such arrangement than to avoid it”.

Even in England, family arrangements are viewed as arrangements governed by principles which are not applicable to dealings between strangers. The Courts, when deciding the rights of parties under family arrangements, consider what is most for the interest of families and have regard to considerations which in dealings between persons not members of the same family would

not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements. (See Halsbury's Laws of England, (3rd Edn.), Vol. 17, 215). Thus in *Williams' case*², the Court held that a family arrangement might be such as the Court would uphold although there were no rights in dispute, and if sufficient motive for the arrangement was proved, the Court would not consider the adequacy of consideration. But the question of consideration or mutuality would arise, as *Williams' Case*², shows, when other considerations, such as existing or an apprehended dispute or the question of preservation of property or honour of the family, are absent, so that it is not necessary for a valid family arrangement that there must exist actual competitive claims or disputes or that the arrangements must be backed by proper consideration. Even disputes likely to arise in future or preservation of family property and honour would be sufficient to uphold an arrangement *bona fide* made between the members of a family.

9. What actually happens when such a family arrangement is made is explained by Bose, J., in *Sahu Madho Das v. Mulund Ram*³, in the following words:—

“It is well settled that a compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than the portions allotted to them respectively. That explains why no conveyance is required in these cases to pass the title from the one in whom it resides to the person receiving it under the family arrangement. It is assumed that the title claimed by the person receiving the property under the arrangement had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary.”

1. (1867) 2 Ch. A. 294.

2. 1955 S.C.J. 417; (1955) 2 M.L.J. (S.C.) 1; (1955) 2 S.C.R. 22; A.I.R. 1955 S.C. 481.

1. A.I.R. 1966 S.C. 1836.

He went on to say that this was not the only kind of arrangement which the Courts would uphold, and that they would take the next step of upholding "an arrangement under which one set of persons abandons all claims to all title and interest in all the properties in dispute and acknowledges that the sole and absolute title to all the properties resides in only one of their number (provided he or she had claimed the whole and made such an assertion of title) and are content to take such properties as are assigned to them as gifts pure and simple from him or her or as a conveyance for consideration when consideration is present." In such a kind of arrangement where title in the entire property is acknowledged to reside in only one of them and thereupon that person assigns parts of it to others there would be a transfer by that agreement itself which obviously in such a case would need a registered document. This decision lays down the assumption underlying a family arrangement namely, of an anterior title and its acknowledgement in one to whom a property or part of it falls under the arrangement. (See also *Ram Meera Kuwar v Ram Hulas Kuwar*¹). Therefore, it is not necessary that there must exist an anterior title sustainable in law in such a person which the others acknowledge.

10 The arrangement under challenge has to be considered as a whole for ascertaining whether it was made to allay disputes, existing or apprehended, in the interest of harmony in the family or the preservation of property. It is not necessary that there must exist a dispute, actual or possible in the future, in respect of each and every item of property and amongst all members arrayed one against the other. It would be sufficient if it is shown that there were actual or possible claims and counter claims by parties in settlement whereof the arrangement as a whole had been arrived at, thereby acknowledging title in one to whom a particular property falls on the assumption (not actual existence in law) that he had an anterior title therein.

11 In the light of these decisions we must now examine Exhibit 1 to see if

the contention of the appellant that it was a family arrangement is correct or not.

12 The document Exhibit 1, after reciting the death of the common ancestor, Rajkumar, his leaving him surviving four sons and the deaths of certain other family members thereafter, reads as follows:

"Signs of ill feeling developed among us, the executants Nos 1 to 8, and at the time of survey and settlement operations, dispute in connection with the properties arose. On account of dispute, wrong statements and claim were made. On account of which the names of some of us, the executants were recorded in a wrong manner in the record of rights and in the office of the Land Registration Department, in respect of some of the properties having regard to the real state of affairs and title. At the time of the survey and settlement operations etc., the claims and allegations of us, the executants Nos 1 to 3, were that we, the executants, are all members of the joint family and the properties standing in the names of a certain member of the family as well as those in the name of certain female member of the family, belong to the joint family. Contrary to this, the claims and allegations of us executants Nos 4 to 5 were that all the four sons of Raj Kumar Singh became separate and that executants Nos 1 to 3 always continued to remain separate from the (other) executants and executants Nos 4 and 5, separate from the (other) executants and executants Nos 6 to 8 separate from the other executants, but in spite of this allegation of separation, executants Nos 4 and 5, on account of dispute, made contrary to the real state of affairs with respect to certain properties owned and possessed by executants Nos 1 to 3, and executants Nos 6 to 8 also made allegations and claim of separation and it was alleged that executants Nos 1 to 5 (?) neither had nor have any connection and concern with the properties which were and are in the names of Most Patriga Kuer and Most Reshma Kuer although no party was member of a joint family, nor was any property joint.

¹ (1873 74) 1 Ind App 157 at P 166.

As the dispute among us, the executants, is contrary to the real state of affairs, and in case the said dispute continues there is apprehension of considerable loss and damage to us, the executants, therefore, on the advice of the well-wishers of the parties and of respectable persons and on the advice of the legal advisors of the parties, as also with a view to set at rest all kinds of dispute, it was settled that all the disputes should be put to an end by executing a deed of agreement by way of a deed of relinquishment of claims (Ladavi) and the property, which is actually owned and possessed by a certain party should be declared to belong to that party exclusively, and as a matter of fact, the family of us, the executants, is separate and the property, which stands in the name of a certain person, has been purchased from his or her funds, and in respect of his or her name should continue to remain entered in the Land Registration Department, etc., and the name should be entered if the same is not entered and the other parties totally gave up their claim with respect thereto."

Then follow paras. 1 to 4 in each of which certain properties are set out, and in respect of which, title of each of the four sets of the executants is acknowledged by the rest. Para. 4, which relates to properties falling to the share of Nanhku, executant 8, commences with the declaration by the rest of the executants, including Amar Singh and Sonadhari, that Nanhku was the adopted son of Ramji and Patreja Kuer, that certain properties set out therein were exclusively acquired by Patreja Kuer and that Nanhku, as the adopted son of Ramji and Patreja Kuer, was exclusively entitled to them on the death of Patreja, and that "we, the executants Nos. 1 to 5, 6 and 7, and the heirs of executant No. 6 neither have nor shall have any claim, title or possession and connection in respect thereof in any manner and on any allegation." Following up the arrangement made in Paras. 1 to 4, Schedule 4, giving particulars of properties which were acknowledged to be belonging to the four sets of executants were appended to Exhibit I. As regards two houses, one at Rajipur and the other in dispute, Schedules 3 and 4 both set out a half share in them as belonging to executants 6 and 7 and the

other half as belonging to executant 8, *i.e.*, Nanhku, in each of them.

13. As already stated, the fundamental premise on which the Division Bench proceeded to consider Exhibit I was that there were three sets of executants, namely, those belonging to Lalji's branch, *i.e.*, executants 1 to 3, those belonging to Raghunandan's branch, *i.e.*, executants 4 and 5, and the third set consisting of Amar Singh and Sonadhari executants 6 and 7, and Nanhku, executant 8. The second premise on which the Division Bench rested its entire reasoning was that whereas there were disputes between the three sets of executants, there were no disputes between Amar Singh, Sonadhari and Nanhku, that in fact the three of them acted in concert, and that therefore, one-half share given to Nanhku in the house in dispute was altogether voluntarily given without any anterior title and without any claim or dispute raised by Nanhku in respect thereof. In our view, both the premises were incorrect rendering the conclusion drawn therefrom untenable.

14. It is true that Amar Singh had in 1898 purchased out of his own moneys the land on which the suit house stands. It is also true that Nanhku was adopted sometime before the execution of Exhibit I, and therefore, on the date of its execution he could not have any valid claim enforceable in law in any property belonging to Amar Singh and his branch. But, as stated earlier, a dispute or a contention, the settlement of which can constitute a family arrangement, need not be one which is actually sustainable in law. The harmony in a family can be unsettled even by competitive and rival claim which cannot be upheld in law. Therefore, if Amar Singh and the other executants or some of them were to challenge, for instance, the factum of the validity of Nanhku's adoption, or if notwithstanding his adoption, Nanhku were to make a claim in properties held by Amar Singh and his branch or if some of the executants were to claim that the family of Rajkumar was still a joint and undivided family or that though the members of the family were separate, the properties held in the individual names of some of them including Reshmi Kuer and Patreja Kuer were joint, there would be sufficient

disputes to constitute a settlement of them a family arrangement. A claim, made by executants 1 to 5 that the properties held by Reshmi Kuer and Patreja Kuer were not their separate properties but were joint family properties, liable to be partitioned amongst all, was bound to affect both Amar Singh and Nanhku. If such a claim were to be persisted and dragged to a Court of law there is no gainsaying that it would put into jeopardy not only the interests of Amar Singh and Nanhku but also the harmony of the family.

15 The recitals in Exhibit 1 clearly show that whereas members of Lalji's branch were claiming that the family was still joint and undivided, and therefore they had interest in all the properties irrespective of their standing in the names of particular individuals, Raghunandan and his son claimed that the members of the family were not joint and yet claimed share in all the properties including those standing in the names of Reshmi Kuer and Patreja Kuer. Thus the claims by executants 1 to 5 were definitely hostile to the interests of Amar Singh to the extent of the properties standing in the name of Reshmi Kuer and of Nanhku to the extent of the properties standing in the name of Patreja Kuer. The claims made by the branches of Lalji and Raghunandan sought to bring all the properties into hotchpot including those held by Reshmi Kuer and Patreja Kuer thus affecting the rights of Amar Singh and Nanhku in the different properties and not the same properties. Their interest, therefore, were not identical and there was thus no reason for them to act jointly. Indeed, there was no evidence whatsoever and nothing in Exhibit 1 itself to show that they were acting in concert as assumed by the Division Bench.

16 It is true that the recitals in Exhibit 1 do not expressly set out any conflict of claims between Amar Singh and Nanhku. Nevertheless, it is significant that in para 4 of Exhibit 1 the executants found it necessary to insert therein a declaration not only by executants 1 to 5, but also executants 6 and 7 that Nanhku was the adopted son of Ramji and Patreja Kuer, that on the death of Patreja Kuer he, as such adopted son, was absolutely en-

titled to the properties set out therein in addition to those which stood in the name of Patreja Kuer. If the adoption of Nanhku was accepted by all and was not made the subject matter of any doubt or dispute, there was no necessity of including such a declaration and in particular joining executants 6 and 7 in such a declaration. If Amar Singh and Nanhku were acting in concert why had Amar Singh and his son, Sonadhar, as executants 6 and 7, to be joined as declarants to the adoption of Nanhku. Para 4 of Exhibit 1 also shows that there were certain bonds and mortgage deeds standing in the name of Patreja Kuer which were acquired from out of the personal funds of Ramji. Such a statement had to be acknowledged in paragraph 4 presumably because rights in those bonds and deeds were not admitted to be the exclusive rights of Patreja. If those rights were to be treated as joint family property, as claimed by executants 1 to 5, Amar Singh would get a share in them and to that extent his interest must be said to be in conflict with that of Nanhku. A similar result would follow if properties standing in the name of Reshmi Kuer were to be treated as joint family properties. It would not, therefore, be correct to assume that in the disputes amongst the different branches of the family, Nanhku and Amar Singh were acting in concert or that there was no conflict of interest between them. In our judgment, the parties to Exhibit 1 arrived at a settlement in view of claims and cross claims by some against the others. Taken as a whole and in the light of the recitals and the statements in the operative part of the document indicating conflicts amongst the members of the family, the document represented an arrangement *bona fide* entered into, for settling existing or at any rate apprehended disputes, and therefore, satisfied the tests of a family arrangement laid down in the decisions earlier referred to. In this view Nanhku must be said to have acquired a half share in the house in dispute under Exhibit 1.

17 On the question of adverse possession by a co sharer against another co sharer, the law is fairly well settled. Adverse possession has to have the characteristics of adequacy, continuity and exclusiveness. The onus to establish these

characteristics is on the adverse possessor. Accordingly, if a holder of title proves that he too had been exercising during the currency of his title various acts of possession, then, the quality of those acts, even though they might not be sufficient to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from a person challenging by possession the title which he holds. (See *Kutbali Moothavar v. Peringanti Kunharankutti*¹. As between co-sharers, the possession of one co-sharer is in law the possession of all co-sharers. Therefore, to constitute adverse possession, ouster of the non-possessing co-sharer has to be made out. As between them, therefore, there must be evidence of open assertion of a hostile title coupled with exclusive possession and enjoyment by one of them to the knowledge of the other. (See *Lakshmi Reddy v. Lakshmi Reddy*², and also *Mohammad Baqar v. Naimun-Nisa Bibi*.³ But, once the possession of a co-sharer has become adverse as a result of ouster, a mere assertion of a joint title by the dispossessed co-sharer would not interrupt the running of adverse possession. He must actually and effectively break up the exclusive possession of his co-sharer by re-entry upon the property or by resuming possession in such a manner as it was possible to do. (See *Wuntakal Yalpi Chenabasavana Gowd v. Y. Mahabaleswarappa*.⁴ The mere fact that a dispossessed co-sharer comes and stays for a few days as a guest is not sufficient to interrupt the exclusiveness or the continuity of adverse possession so as not to extinguish the rights of the dispossessed co-sharer. (See *Ammakannu Ammal v. Narayaraswami Mudaliar*⁵.

18. On this issue, the parties led considerable evidence, oral and documentary. On examination of that evidence, both the trial Court and the learned Single Judge gave a concurrent finding that

even if the possession by the respondents was adverse the appellant and his father had done acts of possession at various intervals which were sufficient to interrupt both the continuity and the exclusiveness of possession by the respondents. The Division Bench, however, did not agree with the concurrent finding on a reappraisal of the evidence by it. It is not necessary for us to go into the details of that evidence once again as certain facts clearly emerge out of the evidence to prevent the extinguishment of Nanhku's and the appellant's title in the property as a result of adverse possession by the respondents.

19. The principal facts which impressed the Division Bench were: (1) that though in the Demand Register of Patna Municipality for 1915-16 (Exhibit L) Sonadhari and Baijnath were the only persons named as occupiers, Nanhku had not taken steps to include his name, (2) that all throughout it was Sonadhari and Baijnath who paid the Municipal taxes and Nanhku at no time paid his share of the taxes or his share in the cost of repairs and laying of a water pipe in the house, and (3) that though in his written statement in suit No 33 of 1933 Baijnath claimed that he was in exclusive possession of the house as he had paid Nanhku the proportionate price of his share, Nanhku did not take any steps to vindicate his title until he and his son filed the present suit in 1949 by which time the statutory period for adverse possession had already been completed.

20. There was, however, evidence of Nanhku and his wife having stayed on different occasions in the house. But the Division Bench was of the view that such acts of possession were only casual and did not have the effect of interrupting the adverse possession of the respondents.

21. It needs to mention in this connection that Nanhku was all along residing in a village and not in Patna. Therefore, his acts of possession could only be when he came down from his village for some work to Patna. In 1915-1916, when Sonadhari got his name and that of Baijnath entered in the Demand Register (Exhibit E) it might be that Nanhku did not know that they had

1. (1922) 41 M.L.J. 650 : I.L.R. 44 Mad. 883 : L.R. 48 I.A. 395 at 404 : A.I.R. 1922 P.C. 181 at 184.

2. (1957) S.C.J. 248 : (1957) S.C.R. 195 at 202 : A.I.R. 1957 S.C. 314 at 318.

3. A.I.R. 1956 S.C. 548.

4. (1954) S.C.J. 475 : (1954) 1 M.L.J. 714 : (1955) 1 S.C.R. 131 at 138 : A.I.R. 1954 S.C. 337 at 339.

5. A.I.R. 1923 Mad. 633.

omitted his name. His half share in the house had been acknowledged in Exhibit 1 only recently by Amar Singh and Sonadhar as well. Relations between the parties had not yet become unfriendly so as to make Nanhku suspect that his name would be deliberately omitted in the municipal records or that possession by Sonadhar and later on by Bajnath would be treated by them as adverse. Bajnath, no doubt, was using the whole house, but so long as his possession did not amount to ouster his possession would be that of both the co-sharers. If Bajnath used the entire house except when Nanhku stayed in it during his occasional visits, Nanhku would naturally think that Bajnath should pay the taxes. It was not the case of the respondents that Bajnath ever demanded a share in the taxes or a share in the cost of repairs and that such a demand was refused by Nanhku. The High Court on these facts was not right in observing that the title of Bajnath was already completed by adverse possession long before Bajnath filed his written statement in 1933, as mere use and enjoyment by him of the house, in the absence of such use amounting to ouster, would not make it adverse possession.

22 It was for the first time that in the written statement filed in 1933 Bajnath openly asserted his title to the whole of the house. Since that assertion was accompanied by the fact that he was in enjoyment of the whole house that act would amount to ouster and adverse possession would commence as from that date. Obviously, the earlier possession could not be tacked on to the subsequent possession because the plea in that very written statement was that Bajnath had paid off the price of Nanhku's share thereby impliedly admitting Nanhku's title to a half share in the house. Suit No 33 of 1933 in which Bajnath filed the said written statement was settled in 1941. In the compromise application filed by Nanhku and Bajnath, both of them stated that they were residing in that house. That assertion by Nanhku was never disputed by Bajnath.

23 But apart from that assertion there was the fact that Nanhku had no other place to reside in Patna. His case was that whenever he visited Patna he used

to stay in the house in dispute. Apart from that assertion being natural, his evidence in that connection was corroborated by Prabhu Narain, PW 4, an advocate residing in the neighbourhood. The Division Bench brushed aside his evidence without giving any adequate reason although it had been accepted by both the trial Court and the learned Single Judge. In the light of this evidence it is not possible to say that all through out the period from 1933 till the statutory period for adverse possession was completed Nanhku had not stayed in the house at any time. Respondent 1 herself admitted that on Suit No 33 of 1933 being settled, relations between Nanhku and Bajnath became friendly. If that be so, it was natural that Nanhku would stay in the house whenever he visited Patna in 1941 and thereafter.

24 The Municipal Survey khasra (Exhibit 2) dated 19th December, 1933, mentions Nanhku along with Sonadhar and Bajnath as owners of the house. Since this entry was made after Bajnath had made a hostile claim to the entire house in the written statement filed in Suit No 33 of 1933 on 16th September, 1933, the entry must presumably have been made at the instance of Nanhku. Such an act on his part would be a clear assertion of his title in the house. Under the Bihar and Orissa Municipal Survey Act, I of 1920, before such khasra was finalised it had to be published and objections to it, if any, had to be invited and disposed of. No objection was ever raised by Bajnath to the said khasra. It is surprising that Bajnath did not resist the entry in the khasra although he had made a claim to the whole of the property only three months before the date of the khasra. That indicates that his claim was merely a counter-blast against Nanhku's suit.

25 The view of the Division Bench that the occasional putting up by Nanhku and his wife in the disputed house was merely casual and was in the nature of visits as guests of the respondents cannot be accepted. Such stay, however occasional, would not be casual as it was accompanied by an open assertion of his title as evidenced by the khasra (Exhibit 2). It could not also be that he stayed in the house as the guest of the respondents because, after he filed the suit in

1933 and until it was settled, his relations with Baijnath could not have been friendly. These acts on the part of Nanhku were ample enough to interrupt the continuity and the exclusiveness of possession by Baijnath.

26. The Division Bench also relied on a sale deed (Exhibit C) dated 12th October, 1933, executed by Baijnath and Tarkeshwar in favour of one Kamalnain Pandey. The High Court appears to have taken the view that the land sold under Exhibit C appertained to or was part of the land on which Amar Singh had put up the disputed house, and that although Baijnath and Tarkeshwar sold part of that land, no objection was taken at any time to such a sale by Nanhku. The recitals in Exhibit-C show that the land sold under Exhibit-C was jointly purchased on 20th January, 1898, by Amar Singh and one Gajadhar Singh for construction of a house thereon. Amar Singh had a share in the said land to the extent of 1 katha 15 dhurs while his co-purchaser had a share of 2 kathas 15 dhurs. The recitals further show that Amar Singh's original intention in purchasing the land was to build a house thereon. He appears to have given up that idea as all this sale took place the land was lying waste and un-utilised. It is important to note that this sale was for 1 katha 10 dhurs, out of 1 katha 15 dhurs which was the share of Amar Singh. This and obviously could not be the land on which the house in dispute was built, for, if that was so, Baijnath could not have sold away 1 katha 10 dhurs out of the total extent of 1 katha 15 dhurs to which Amar Singh was entitled. The house could not have stood on 5 dhurs only. Therefore, the land sold under Exhibit-C was a land different from the one on which the disputed house was situated. This conclusion is also borne out by the description of the sold land in the schedule to Exhibit-C where its northern boundary is described as follows:

"North : Parti (waste) land thereafter the house of us, the executants." This description shows that between the disputed house and the land sold under Exhibit-C there was to the north of it some waste land. The land sold under Exhibit-C being different land, the High Court was not right in relying on that

sale deed to prove adverse possession on the ground that Nanhku never took objection to the said sale. He could not, as this land had nothing to do with the house in dispute. Besides the evidence discussed above, there was other evidence. But the incidents therein described were irrelevant on the question of adverse possession as they took place in 1948 and thereafter, that is to say, a long time after title by adverse possession would have been completed if such adverse possession were to be accepted as established. In view of the evidence discussed above the Division Bench was not justified in interfering with the finding of fact concurrently given by the trial Court and the learned Single Judge that the adverse possession by Baijnath which commenced from 1933 was sufficiently interrupted by acts of possession by Nanhku, and therefore, his title was not extinguished by adverse possession.

27. In the view we take on both the questions, the appeal must be allowed and the judgment and decree of the Division Bench must be set aside and the judgment and decree passed by the trial Court and upheld by the learned Single Judge must be restored. The respondents will pay to the appellant his costs all throughout.

V.K. ————— *Appeal allowed.*

THE SUPREME COURT OF INDIA.
(Civil Appellate Jurisdiction.)

PRESENT.—*K.S. Hegde and A.N. Grover, JJ.*

The Bank of Bihar .. Appellant*

v.

The State of Bihar and others .. Respondents.

Contract Act (IX of 1872), sections 176 and 180—Rights of pawnee vis-a-vis other creditors of the pawner—Rights cannot be defeated by lawful seizure of goods by Government.

The rights of the pawnee who had parted with money in favour of the pawner on the security of the goods cannot be defeated by the goods being lawfully seized by the Government and the money being made available to other creditors of the

* C. A. No. 1942 of 1966.

1st April, 1971.

pawnee, without the claim of the pawnee being fully satisfied. The pawnee has special property and a lien which is not of ordinary nature on the goods and so long as his claim is not satisfied no other creditor of the pawnee has any right to take away the goods or its price. After the goods had been seized by the Government it was bound to pay the amount due to the pawnee and the balance could be made available to satisfy the claim of other creditors of the pawnee. But by a mere act of lawful seizure the Government cannot deprive the pawnee of the amount which was secured by the pledge of the goods. [Para 7]

Appeal against the Judgment and decree of the High Court of Bihar in A.F.O.D. No. 420 of 1955 dated 23rd April, 1963.

The Judgment of the Court was delivered by

Grove, J.—This is an appeal by certificate from a decree of the Patna High Court in a suit instituted by the appellant against the State of Bihar which was impleaded as defendant No. 1, the other defendants being the Jagdishpur Zamindari Co. Ltd., (defendant No. 2) and some of its directors defendants 3 to 5.

2. According to the allegations in the plaint one of the methods of making advances followed by the plaintiff Bank was that the constituents pledged their merchandise on a cash credit system with the Bank and took advances on the pledged goods. The Bank held the goods as security for the advances made and the constituents either provided the Bank with godown or the Bank kept the pledged goods in godowns of its own and charged rents from the constituents. The defendant No. 2 entered into a cash credit system agreement with the plaintiff's Arrah Branch, the arrangement being that the sugar would be pledged under the cash credit system. On 16th December, 1946, the advance made to defendant No. 2 stood at Rs. 3,20,486-2-0 and the Bank held 6,239 bags of different varieties of sugar as security. These bags were kept in godowns provided by defendant No. 2. The key of the lock of each godown was in the custody of the Bank. It was alleged that in December, 1949 under cover of an illegal seizure order issued by defendant No. 1 the Rationing Officer and the District Magistrate, Patna, got the locks of the godown broken

open and forcibly and illegally removed 1,818 bags of 27-D quality of sugar. The total quantity removed weighed about 5,000 maunds. No payment was made to the plaintiff Bank which held the bags of sugar as pledgee under the cash credit agreement. It is unnecessary to refer to the other facts stated in the plaint except to mention that according to the plaintiff it was entitled to recover the sugar which had been seized illegally or to recover the price of that sugar as per Schedule 2 of the plaint which the plaintiff would have got if the quantity of sugar which had been seized had been sold in the market on the material day. The plaintiff prayed for a decree for the return of 1,818 bags of 27-D quality sugar and, alternatively, for recovery of Rs. 1,81,700-9-3 with interest by way of damages for illegal removal and detention of sugar or price thereof. Alternatively a decree for Rs. 93,910-10-9 was claimed against defendant No. 2 and the other defendants.

3. The suit was resisted by defendant No. 1 on the ground that the seizure had been effected pursuant to lawful orders which had been made and that the sale proceeds of about 5,000 maunds of sugar were included in the sum of Rs. 1,50,039-10-9 which was deposited in the treasury but which was later on attached under the orders of Certificate Officer, Patna, under the Public Demands Recovery Act on account of arrears of sugar cess amounting to Rs. 2 lakhs due from the Bhita Sugar Factory with which defendant No. 2 had entered into an arrangement pursuant to which the entire quantity of sugar including 5,000 maunds which had been seized had come into possession of defendant No. 2. The other defendant also resisted the suit on various grounds. A number of issues were framed on the pleadings of the parties. We may only mention issue No. 6 (a) which will be material for determination of the points which we have been called upon to decide—

“Was the sugar seized by the Government in possession of the Bank as a pledgee at the time of the seizure and have the rights of the Bank as such pledgee been determined by the seizure in question?”

4. The trial Court held that the order of seizure in respect of the stock of sugar

was valid. It was further held that the plaintiff's right as a pledgee could not be extinguished by seizure of the sugar in its possession and though the attachment order of the Certificate Officer was legal and binding on defendant No. 2 it was not binding on the Bank (plaintiff) and it could be effective only in respect of that portion of the price which was not necessary for the liquidation of the dues of the plaintiff from defendant No. 2. A decree was passed in favour of the plaintiff against defendant No. 1 only for Rs. 93,910-10-9 with interest at 6% per annum from the date of the suit till realisation. Defendant No. 1 (State of Bihar) filed an appeal to the High Court. The High Court was of the view that in the presence of the finding that the plaintiff had not been wrongfully deprived of the sugar on account of the lawful seizure of its price owing to the certificate proceedings started by the Cane Commissioner the plaintiff was not entitled to any decree against the State. But it was entitled to a decree against defendant No. 2 and the other defendants. Consequently a decree against defendant No. 1 was set aside and instead a decree was granted against the other defendants.

5. Now it is common ground that the plaintiff (which is the appellant before us) held the sugar which was seized from its custody as security for payment of the debts or advances made to defendant No. 2 in its cash credit account. There were arrears of certain cess due from defendant No. 2. As stated before, the Cane Commissioner took proceedings under the Public Demands Recovery Act and attached the price of the sugar which had been deposited by the appropriate authorities in the Government Treasury instead of being paid to the plaintiff. The Cane Commissioner indisputably did not have any right of priority over the other creditors of defendant No. 2 and, in particular, the secured creditors. Section 172 of the Contract Act defines a pledge to mean the bailment of goods as security for payment of debt or performance of a promise. The bailor is called the "pawnee", and the bailee is called the "pawnor". Section 173 of that Act provides that the pawnee may retain the goods pledged not only for the payment of the debt or perfor-

mance of the promise but also for the interest of the debt etc. Section 176 is in the following terms :

"If the pawnor makes default, in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale."

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor."

Section 180 is to the effect that if a third person wrongfully deprives the bailee of the use of the possession of the goods bailed or does him any injury the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury. According to section 181 whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and bailee, be dealt with according to their respective interests. Relying on the above two sections the High Court came to the conclusion that a pawnee has merely the possession of the goods coupled with a power to sell them on default by the pawnor but the latter retains the ownership subject to a lien to the extent of the debt enforceable by exercise of the power of sale. In the present case the sugar had been seized and then sold. The sale proceeds would have been available to defendants 2 to 5 subject to the claim of the plaintiff against them but it ceased to have any lien on the pledged property or the sale proceeds against any third party including the State as soon as it was legally deprived of the possession of the pledged goods.

6: According to the statement in Halsbury's Laws of England "pawn" has been described as a security where by contract a deposit of goods is made as

security for a debt and the right to the property vests in the pledgee so far as is necessary to secure the debt, in this sense it is intermediate between a simple lien and a mortgage which wholly passed the property in the thing conveyed * "The pawnee has a special property or special interest in the thing pledged, while the general property therein continues in the owner. That special property or interest exists so that the pawnee can compel payment of the debt or can sell the goods when the right to do so arises. This special property or interest is to be distinguished from the mere right of detention which the holder of a lien possesses, in that it is transferable in the sense that a pawnee may assign or pledge his special property or interest in the goods" ** "Where judgment has been obtained against the pawnor of goods and execution has issued thereon, the sheriff cannot seize the goods pawned unless he satisfied the claim of the pawnee (based mainly on *Rogers v Kennay*) "On the bankruptcy of the pawnor the pawnee is a secured creditor in the bankruptcy with respect to things pledged before the date of the receiving order and without notice of a prior available act of bankruptcy" *** It has not been shown how the law in India is in any way different from the English law relating to the rights of the pawnee *vis a vis* other unsecured creditors of the pawnor.

7 In our judgment the High Court is in error in considering that the rights of the pawnee who had parted with money in favour of the pawnor on the security of the goods can be defeated by the goods being lawfully seized by the Government and the money being made available to other creditors of the pawnor without the claim of the pawnee being fully satisfied. The pawnee has special property and a lien which is not of ordinary nature on the goods and so long as his claim is not satisfied no other creditor of the pawnor has any right to take away the goods or its price. After the goods had been seized by the Government it was bound to pay the amount

due to the plaintiff and the balance could have been made available to satisfy the claim of other creditors of the pawnor. But by a mere act of lawful seizure the Government could not deprive the plaintiff of the amount which was secured by the pledge of the goods to it. As the act of the Government resulted in deprivation of the amount to which the plaintiff was entitled it was bound to reimburse the plaintiff for such amount which the plaintiff in ordinary course would have realized by sale of the goods pledged with it on the pawnor making a default in payment of debt.

8 The approach of the trial Court was unexceptionable. The plaintiff's right as a pawnee could not be extinguished by the seizure of the goods in its possession inasmuch as the pledge of the goods was not meant to replace the liability under the cash credit agreement. It was intended to give the plaintiff a primary right to sell the goods in satisfaction of the liability of the pawnor. The Cane Commissioner who was an unsecured creditor could not have any higher rights than the pawnor and was entitled only to the surplus money after satisfaction of the plaintiff's dues.

9 Defendants 3 to 5 did not file any appeal against the judgment of the High Court. The decree passed by the High Court against them would, therefore, stand. In the view that we have taken the appeal is allowed, the judgment and decree of the High Court dismissing the suit against the State of Bihar is hereby set aside and a decree is granted against the State of Bihar in the same terms as was granted by the trial Court. The appellant will be entitled to costs throughout.

V K

Appeal allowed

* 3rd Edition Vol 29 p 211

** Halsbury's Laws of England, 3rd Edition, Vol. 29 pp 218-219

*** Halsbury's Laws of England 3rd Edition Vol 29 p 222

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